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SUPREME COURT, U.S.

NO. 83-5902

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

ROBERT WAYNE WILLIAMS,

Petitioner,

vs.

JOHN T. KING, Secretary,
Louisiana Department of Corrections, and
ROSS C. MAGGIO, JR., Warden,
Louisiana State Penitentiary, Angola,
Louisiana,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEY OF RECORD

QUESTIONS PRESENTED

I. What is the standard of review of constitutional issues raised in second and successive habeas corpus petitions under Rule 9 of the Rules Governing Section 2254 Cases?

II. Can the defense of "abuse of the writ" properly be held to bar consideration of the merits of constitutional issues on a habeas corpus appeal without giving the petitioner an opportunity to contest that defense on the facts in the district court?

III. Is it an "abuse of the writ" for a death-sentenced inmate to renew in a second habeas corpus petition a claim of prosecutorial misconduct in closing argument which is indistinguishable from claims sustained by supervening decisions of a court of appeals of another circuit?

IV. Does the inconsistent practice of the Louisiana Supreme Court in conducting proportionality review of capital sentences violate the eighth and fourteenth amendments?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Robert Wayne Williams respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO OPINIONS BELOW

The opinions of the Court of Appeals, Williams v. Maggio, No. 83-3647 (5th Cir. Oct. 23, 1983), and the District Court for the Middle District of Louisiana, Williams v. King, No. 83-1120-B (M.D. La. Oct. 21, 1983), are not yet reported. They are attached as Appendices A and B, respectively.

JURISDICTION

Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals was entered on October 23, 1983. Timely suggestions for rehearing and rehearing en banc were denied on November 29, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part that

> in all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...;

the Eighth Amendment to the Constitution of the United States, which provides that

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

the Louisiana rule of court governing the review of sentences in capital cases, which provides

> Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> . . .
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant;

La. S.Ct. R. 905.9.1.

This case also involves Rule 9 of the Rules Governing Section 2254 Cases.

STATEMENT OF THE CASE

A. Course of the Proceedings

On April 18, 1979, petitioner was convicted of capital murder in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana, and sentenced to death. On direct appeal, the Louisiana Supreme Court affirmed both the conviction and sentence, State v. Williams, 383 So.2d 369 (La. 1980), and this Court denied review. Williams v. Louisiana, 449 U.S. 1103, reh. denied, 450 U.S. 971 (1981).

On March 20, 1981, petitioner filed an Application for Post-Conviction Relief in the state trial court. Without conducting an evidentiary hearing, the court dismissed his application in an unpublished order on March 24, 1981. Two days later, with two justices acknowledging that his claims were substantial and one other concluding that his case involved constitutional error, the Louisiana Supreme Court affirmed. State ex rel. Williams v. Blackburn, 396 So.2d 1249 (1981).

The next day, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Louisiana. On the same day, without conducting an evidentiary hearing, in an unreported order and judgment, the district judge denied his petition. A panel of the United States Court of Appeals for the Fifth Circuit agreed, Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981). By a divided vote, the en banc court affirmed, Williams v. Blackburn, 679 F.2d 381 (5th Cir. 1982)(en banc), and this Court denied certiorari. Williams v. Blackburn, ___ U.S. ___ (June 27, 1983), reh. denied, ___ U.S. ___ (Sept. 8, 1983). At that point, the state trial judge ordered petitioner's

execution to take place in the early morning hours of October 25, 1983.

Because of significant changes in the relevant law since filing his first habeas petition, petitioner returned to the state trial court to file a new Application on October 4, 1983. It was denied summarily on the same day. The Louisiana Supreme Court affirmed on October 18, 1983, and refused to stay the impending execution.

Petitioner then filed a second habeas corpus petition in the federal district court. On October 21, 1983, the district judge entered an order dismissing the petition, denying a certificate of probable cause, and refusing to stay the execution. Williams v. King, No. 83-1120-B (M.D. La. Oct. 21, 1983)(Appendix A).

On appeal, with less than two days remaining before petitioner's scheduled execution, the Fifth Circuit granted a certificate of probable cause and affirmed the district court judgment, but stayed the execution pending certiorari in this Court. Williams v. Maggio, No. 83-3647 (5th Cir. Oct. 23, 1983)(Appendix B). Petitioner filed timely suggestions for rehearing and rehearing en banc. While these were still pending, the state moved this Court to vacate the circuit court's stay. The Court granted the state's application, over three dissents. Maggio v. Williams, No. A-301 (U.S. Nov. 7, 1983)(Appendix C). The state immediately obtained an order setting petitioner's execution for December 14, 1983.

The Fifth Circuit denied rehearing and rehearing en banc on November 29, 1983, without opinion.

B. Statement of the Relevant Facts

Robert Wayne Williams was tried by a jury for the murder of Willie Kelly. During the selection of the jury, three prospective jurors were excluded by the trial court apparently because they expressed an unwillingness or an inability to consider death as a possible sentence. Whether or not these prospective jurors unequivocally stated their opposition to the death penalty is a matter of dispute.

At the conclusion of the guilt-innocence phase of Mr. Williams's trial, the judge, pursuant to La. Code of Crim. Proc. 809, instructed the jury on the two responsive verdicts to first degree murder. These verdicts consisted of the lesser included offenses of second degree murder and manslaughter. Significantly, the trial record does not reveal sufficient evidence to support a finding of manslaughter in this case.

At the final and most critical stage of the sentencing phase of Mr. Williams's trial, the prosecutor made extensive and seemingly deliberate use of inflammatory, misleading, and prejudicial statements. These statements occurred throughout the prosecutor's closing and rebuttal arguments.

The trial record reveals that the prosecutor made repeated statements concerning the nature of state and federal appellate review procedures in capital cases. At one point, he assured the jury that they did not have the "last word" on sentencing. See Appendix D. At another point, he stated that the Louisiana Supreme Court was obligated to undertake a "total and complete investigation" of the case that would entail a review of "everything" that occurred at trial. Id. Once this investigation was complete, he said that "[t]he

Justices on the Supreme court will review and determine ... whether or not you [the jury] were correct or not." Id.

The trial record also reveals that the prosecution made inflammatory statements regarding the nationwide problem of violent crime. For example, after an irrelevant account of his own small-town upbringing in rural Louisiana, the prosecutor stated:

> [Baton Rouge is] not the same place. Certainly not here. And we've become accustomed to think that if you go out on the street and walk by yourself at night, it's almost assuming risk in these days and times, that you are going to come to some harm, that you are going to be mugged, robbed, something going to happen to you. But, we at least think that we can still go to the grocery store and shop for food without winding up in the hospital as two people did with shot gun wounds, or a third person in the hospital with having been beat over the head.

Id. Because of the general problem of urban crime, he extorted the jury to put respondent to death.

> [s]omebody's got to put their foot down and say we're not going to go any further. If you do this, you're not going to come out, we're not going to show you mercy, we're not going to reduce anything.

Id. Moreover, he implied that, despite the fact that it had already found the respondent guilty, the jury, as representatives of the community, had a duty to impose the death sentence on respondent rather than let him "get away with it."

> You're the people that set the standards in this community. And I say this, and this is a crime that if you will, outraged this community. It shocked it. And the results of this verdict will go outside of this Court room. And you represent what the standards in Baton Rouge is going to be amongst the law abiding people. Are we going to set the standard or is Robert Williams going to set the standard?

Id.

The trial record further reveals several instances in which the prosecutor improperly injected his personal opinion into the sentencing proceedings. In one instance, he described photographs of the victim's body that were not admitted in evidence and offered his own opinion -- based on "every [capital case] in eight years that I've tried," id. -- on whether this crime was sufficiently atrocious, heinous or senseless to warrant the death penlaty. Id. Compare State v. Sonnier, 402 So.2d 650, 658 (La. 1981)(jury consideration of such factors must be limited to whether "there was torture or the pitiless infliction of unnecessary pain on the victim"). In another instance, the prosecutor asserted his personal knowledge of and experience with the death penalty in an attempt to convince the jury to impose death. Id. ("I think this case deserves it"). In still another instance, he opined generally on the subject of aggravating circumstances, effectively distorting the statutory meaning. Id.

At the conclusion of these final remarks, Mr. Williams was sentenced to death. On appeal, after a comparison of the circumstances of his case to other first degree murder cases in the same judicial district, Mr. Williams's sentence was affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD OF REVIEW OF SECOND AND SUCCESSIVE HABEAS PETITIONS UNDER SECTION 2254 AND RULE 9 OF THE RULES GOVERNING SECTION 2254 CASES.

In this habeas proceeding, petitioner raises substantial constitutional questions concerning the legality of his conviction and death sentence. He challenges the random and arbitrary shifts in the Louisiana Supreme Court's approach to

proportionality review -- from district-wide review in some cases to state-wide review in others. Compare State v. Williams, 383 So.2d 369 (1980) with State v. Moore, 432 So.2d 209, 226-27 (La. 1983); State v. Narcisse, 426 So.2d 118, 138-39 (La. 1983). He challenges the prosecutor's jury argument at the close of the sentencing phase -- especially the prosecutor's blatant arguments about the ability of appellate courts to "correct" any mistakes, the public's general need for a blow against crime, and the prosecutor's own impressions of the reliability of the evidence (see Appendix D) -- as plainly improper and fundamentally unfair. The question presented is whether these claims should be foreclosed or jaundiced on the merits because petitioner had raised others like them in an earlier federal habeas corpus petition.

In the earlier habeas case, petitioner had questioned the adequacy of Louisiana's proportionality review of death sentences, which appeared to be limited (as it plainly was on petitioner's own appeal) to district-wide, rather than state-wide comparative review. That claim was rejected. See Williams v. Maggio, 679 F.2d 381, 395 (5th Cir. 1982)(en banc), cert. denied, ___ U.S. ___, 103 S.Ct. 3553 (1983). Subsequently, however, the Louisiana Supreme Court handed down opinions demonstrating a complete disregard for consistency in its approach to proportionality review, by choosing a different scope of comparison from case to case. See State v. Moore, 432 So.2d at 226-27; State v. Narcisse, 426 So.2d at 138-39. In addition, this Court agreed to give plenary consideration to the general question of proportionality review in Pulley v. Harris, 51 U.S.L.W. 3678 (Mar. 22, 1983). It was on the basis of these changes in the legal landscape that petitioner again challenged the conduct of proportionality review by the Louisiana Supreme Court.

Similarly, mention was made of the prosecutor's closing argument in petitioner's first federal habeas proceeding. There, however, it was only in the context of a claim of ineffective assistance of defense counsel in failing to object to the prosecutor's prejudicial remarks. Petitioner's present claim going to the substance of the remarks themselves turns on supervening decisions of the Eleventh Circuit condemning prosecutors where, as here, they use improper argument to deflect a capital sentencing jury from its grave responsibility for making a focused and dispassionate determination of the defendant's fate. See especially Brooks v. Francis, No. 83-8028, slip op. at 12 (11th Cir. Sept. 15, 1983); Hance v. Zant, 696 F.2d 940, 950 (11th Cir. 1983). Again, it was because of changes in the applicable law that petitioner raised this claim.

Although the district court below made no finding pursuant to Rule 9 that the raising of these issues was an abuse of the writ, a majority of this Court, in an opinion vacating the Fifth Circuit's stay, treated petitioner's issues summarily. Justice Stevens described such treatment as the product of the "strict standard of review" justifiably accorded second federal habeas corpus applications. Maggio v. Williams, slip op. at 4 (Stevens, J., concurring). Justice Stevens explicitly and the Williams majority apparently find issues raised by a petitioner on a second federal habeas petition to be thereby deserving of diminished consideration. Other views expressed in this case and elsewhere suggest that the Court is not resolved on the question. See Maggio v. Williams, slip op. at 6 n. 5 and 9 n. 7 (Brennan and Marshall, JJ., dissenting); Autry v. Estelle, No. A-242, slip op. at 2 (U.S. Oct. 11, 1983). Certainly, no opinion of the Court has yet

explained why, if a constitutional issue is raisable at all on a second or successor habeas petition governed by Rule 9, it is subject to a different standard of consideration on the merits, or what that different standard is.

It is true that the Court has recognized that habeas corpus petitions are subject to certain rules designed to avoid wasteful and oppressive relitigation of issues already decided or issues inexcusably withheld in earlier litigation. "Nothing in the tradition of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." Sanders v. United States, 373 U.S. 1, 8 (1963). The rules developed by the Court, however, have been carefully distinguished from traditional res judicata proscriptions, and have been narrowly bounded. Those described in Sanders and later codified by Congress in 28 U.S.C. §2244(b) and Rule 9(b) are intended only to avoid bad faith or harassing relitigation of issues identical to claims raised in previous petitions by the same petitioner, see 373 U.S. at 12, 17, and of issues vexatiously withheld earlier, see 373 U.S. at 17-18. Indeed, when the proponents of the newest codification attempted to introduce a stricter standard, Congress reacted swiftly both by rejecting any standard "that gave a judge too broad a discretion to dismiss a second or successive petition" and by insisting that the codification be in "conformity with existing law," H.R.Rep. No. 1471, 94th Cong., 2d Sess. 506 (1976), citing Sanders v. United States as indicative of "existing law."

In light of this authority, the Court's November 7 opinions in the present case send confusing signals to the

lower courts and litigants alike about the seriousness with which successive habeas petitions will be taken. Certiorari should be granted to clarify the subject, after plenary consideration, of the appropriate standard of judicial review of such petitions.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DEFENSE OF ABUSE OF THE WRIT MAY PROPERLY BE INVOKED TO BAR APPELLATE CONSIDERATION OF THE MERITS OF A HABEAS PETITIONER'S CONSTITUTIONAL CLAIMS, WHERE NO OPPORTUNITY HAS BEEN AFFORDED THE PETITIONER TO MAKE A RECORD ON THAT ISSUE IN THE DISTRICT COURT.

Both section 2244 and Rule 9 contemplate that abuse of the writ may be raised as a defense to successive petitions. In Sanders, the Court said that

> The burden is on the Government to plead abuse of the writ ... "with clarity and particularlity in its return to the order to show cause."

Id. at 17 (citing Price v. Johnston, 334 U.S. at 291-92). When this charge is raised by a respondent, the petitioner has a right to an appropriate hearing in district court to show why the state's charges do not constitute an abuse. Price v. Johnston, 334 U.S. at 292. The procedure provided by Rule 9 for resolving abuse-of-the-writ questions

> conforms with Johnson v. Copinger, 420 F.2d 395 [,399] (4th Cir. 1969), where the court stated:
>
> > [T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without

> allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness.

Advisory Committee Note to Rule 9.

Petitioner has been given no such opportunity. No hearing has been held and no findings have been made by the district court on the issue of abuse of the writ. Nevertheless, a majority of this Court, responding to a reference to abuse in the state's motion to vacate petitioner's stay, apparently concluded that the writ had been abused. See Maggio v. Williams, slip op. at 4. See also id. at 4 (Stevens, J., concurring). Such a conclusion disregards the procedures envisioned by Rule 9 and Sanders. Certiorari should be granted to determine whether this record provides an adequate foundation to support a finding of abuse.

III.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE PERMISSIBLE SCOPE OF PROSECUTORIAL ARGUMENT IN A CAPITAL SENTENCING HEARING.

At petitioner's sentencing hearing, the prosecutor made extensive and deliberate inflammatory, misleading and prejudicial statements. As outlined above, he dwelled at length upon the nature of state and federal review procedures. He exhorted the jury to condemn petitioner as a general statement against the problem of crime. He offered his own opinion on the reliability of the facts, inadmissible as well as admitted. Collectively and alone, these statements were calculated to undermine the jury process, and violated petitioner's right to a properly informed sentencing judgment under the eighth and fourteenth amendments.

First the prosecutor's statements purporting to describe the appellate review process were simply inaccurate. Contrary to the impression the prosecutor sought to convey, state appellate review does not require a comprehensive investigation or evaluation of trial proceedings, nor is it undertaken to "approve" a sentencing determination. Rather, it is undertaken in order to consider whether a narrow range of procedural and substantive errors were committed at trial, and is discretionary beyond the state's high court. Moreover, these inaccuracies are likely to have compromised the jury's unique sentencing function. See Berger v. United States, 295 U.S. 78, 88-89 (1935) (recognizing the jury's tendency often to defer to the presumed expertise of a prosecutor and to accept his statements as authoritative).

Indeed, only last Term, the Court observed that "[w]e expect that sentencers will exercise their discretion in their own way and to the best of their ability." Barclay v. Florida, ____ U.S. ____, 51 U.S.L.W. 5206, 5209 (July 6, 1983). But juries cannot be expected to exercise that discretion properly and perform their critical role "to the best of their ability" when they are told that their decision does not matter. As the Court has noted:

> advising jurors that a death verdict is ... not "final" may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

California v. Ramos, ____ U.S. ____, 51 U.S.L.W. 5220, 5226 (July 6, 1983). By depreciating the gravity of the jury's roles, such advice destroys the special "need for reliability in the determination that death is the appropriate punisment in a specific case." Zant v. Stephens, ___ U.S. ____, 51 U.S.L.W. 4891, 4897 (June 28, 1983) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). Here, the prosecutor's obvious purpose was no less than to relieve the jury of its awesome sentencing responsibility. Cf. Maggio v. Williams, slip op. at 3 (Stevens, J., concurring).

Second, the prosecutor's remarks regarding the general crime problem during the sentencing phase were plainly intended to stir moral outrage in the jury and distract them from the "individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 51 U.S.L.W. at 4895 (emphasis in original). Although these comments clearly encouraged the jury to focus on matters well beyond the individual under consideration, the district court held that these remarks were not "fundamentally unfair." Williams v. King, No. 83-1120B, slip op. at 11. On identical

facts, however, the Eleventh Circuit recently held that such conduct is "fundamentally unfair" at a capital sentencing hearing and therefore constitutionally impermissible. Brooks v. Francis, No. 83-8028, slip op. at 12 (11th Cir. Sept. 15, 1983); Hance v. Zant, 696 F.2d 940, 950 (11th Cir. 1983). The Eleventh Circuit found that such remarks injected undue prejudice, personal opinion and passion into the sentencing process. It found that such statements would seriously jeopardize the impartiality of the jury and the integrity of the sentence. By contrast, the Fifth Circuit implicitly holds that such statements do not undermine the process, and that a prosecutor's normally broad latitude in closing argument is no less so at a capital sentencing hearing. Williams v. Maggio, No. 83-3647, slip op. at 8 (5th Cir. Oct. 23, 1983).

In vacating the Fifth Circuit stay, the majority stated that petitioner challenged the prosecutor's argument, "either directly or indirectly, in his first habeas proceeding." Maggio v. Williams, slip op. at 4. In his concurrence, Justice Stevens noted that the "essence of this issue was raised in prior proceedings." Id. at 3 (concurring opinion). Petitioner has consistently maintained that his earlier "challenge" was merely a reference in the context of a claim of ineffective assistance of counsel. Even assuming the present claim is the same, however, intervening decisions justify the renewal of this claim under Rule 9(b). Since the first petition, this Court has thrice spoken on the special importance of the integrity of the jury's role in capital sentencing. See Barclay v. Florida, 51 U.S.L.W. at 5209; California v. Ramos, 51 U.S.L.W. at 5226; Zant v. Stephens, 51 U.S.L.W. at 4897. In addition, on virtually identical facts, the Eleventh Circuit has reached an opposite conclusion than the Fifth on what the Constitution requires. See

Brooks v. Francis, slip op. at 12; Hance v. Zant, 696 F.2d at 950. Thus, although both the Fifth and Eleventh Circuits believe they were applying the standard established in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the same circumstances lead to different outcomes.

Because of significant intervening changes in the applicable law, the claim was appropriately renewed in a successive petition. See Rule 9(b). Because the question is of extreme importance in the sentencing phase of a capital trial, the Court should grant plenary consideration.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE CONSTITUTION REQUIRES A CONSISTENT APPROACH TO COMPARATIVE APPELLATE REVIEW OF DEATH SENTENCES.

In a previous federal habeas corpus proceeding, petitioner challenged the constitutionality of Louisiana's practice of conducting only district-wide proportionality review. In that proceeding, the Fifth Circuit upheld the Louisiana practice on the ground that the Court had never implied that state-wide review is constitutionally required. Williams v. Maggio, 679 F.2d 381, 395 (5th Cir. 1982) (Unit A) (en banc), cert. denied, ____ U.S. ____, No. 32-5868 (Sept. 8, 1983). The Louisiana court concluded that district-wide review "provides adequate safeguards against freakish imposition of capital punishment," id., thus leaving states, in a circuit where a great many capital prosecutions occur and death sentences result, free to undertake proportionality review at their own instance and within any geographical area whatsoever.

Since the Fifth Circuit en banc decision, however, the problem has changed in nature. The Louisiana Supreme Court has twice accorded capital defendants some form of more extensive, state-wide review. State v. Moore, 432 So.2d 209, 226-27 (La. 1983) (random comparison of first-degree murder cases state-wide); State v. Narcisse, 426 So.2d 118, 138-39 (La. 1983) (comparison of first-degree murder cases in two districts). The court has offered no explanation for why these cases were treated differently nor enunciated any standard to guide other cases. That court's willingness to shift from one approach to another without explanation not only highlights the absence of any principled procedures in Louisiana for conducting proportionality review, cf. Gregg v. Georgia, 428 U.S. 153, 204-06 (1976), but also creates substantial arbitrariness and disproportionality as between Louisiana capital defendants. Such practices fail to provide for the consistency and reliability that is so essential to the fair and evenhanded administration of a state capital sentencing statute. Id. at 222-23 (White, J., concurring).

The Fifth Circuit rejected petitioner's claim in part because, "[j]ust as a venire chosen from a cross-section of the community in which the crime is committed is an adequate constitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder conviction imposed within that venire community is sufficient to insure against arbitrary imposition of the death penalty," Williams v. Maggio, slip op. at 7 (quoting Williams v. Maggio, 697 F.2d at 395). What this overlooks, of course, is the fact that the jury so chosen may have reached an aberrant result or that different communities may approach capital sentencing differently. Consistent, state-wide proportionality review ensures the fair administration of a capital sentencing statute through a moderating and evening effect in sentences; it is a critical safeguard that corrects the arbitrary action of an aberrant jury

or the capricious decisions of a particular community towards specific crimes or individuals.

Since Louisiana's unexplained and arbitrary practice cannot assure that proportionate sentences will be meted out across the state, this Court should consider on certiorari whether Louisiana procedure for comparative review of death sentences comports with the eighth and fourteenth amendments.*/

CONCLUSION

The Court should grant petitioner a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioner

Dated: December 9, 1983

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*/ The Court has agreed to consider questions closely analogous to those raised by petitioner namely

1. Does the Constitution, in addition to procedures whereby trial court and jury impose death sentences, require any specific form of "proportionality review" by [a] court of statewide jurisdiction prior to execution of state death judgment?

2. If so, what is [the] constitutionally required focus, scope, and procedural structure of such review?

Pulley v. Harris, 51 U.S.L.W. 3678. See Pulley v. Harris, 692 F.2d 671-89 (9th Cir. 1982), cert. granted, 75 L.Ed.2d 787 (1983).

APPENDIX A

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ROBERT WAYNE WILLIAMS

versus

JOHN T. KING, ET AL

CIVIL ACTION

NO. 83-1120-B

JUDGMENT

For the written reasons assigned,

IT IS ORDERED AND ADJUDGED that the motion of Robert Wayne Williams for a stay of execution be and it is hereby DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that petitioner's application for a writ of habeas corpus be and it is hereby DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that the motion of Robert Wayne Williams for a certificate of probable cause be and it is hereby DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that the motion of Robert Wayne Williams for a stay pending appeal be and it is hereby DENIED.

Baton Rouge, Louisiana, October 21, 1983.

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HEARING
DOCUMENT No. 13

UNITED STATES DISTRICT JUDGE

Serve: Jonathan S. Walton
Atty for Atty.

U.S. DISTRICT COURT
E. D. LA.
OCT 21 '83
CLERK U.S.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ROBERT WAYNE WILLIAMS — CIVIL ACTION

VERSUS — NUMBER 83-1120-B

JOHN T. KING, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA, AND ROSS MAGGIO, WARDEN, STATE PENITENTIARY, ANGOLA, LOUISIANA

* * * * *

FRANK J. POLOZOLA, District Judge:

Robert Wayne Williams has filed an application for stay of his execution which is scheduled for October 25, 1983, and an application for a writ of habeas corpus. For reasons which follow, the Court hereby denies petitioner's application for a stay of his execution and further denies petitioner's application for a writ of habeas corpus. The Court also finds that petitioner's application is frivolous and without merit, and, therefore, refuses to issue a certificate of probable cause.

I. PROCEDURAL HISTORY OF THE CASE

This is the second time Robert Wayne Williams has filed an application for a stay of execution and for a [illegible]

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habeas corpus with this Court. The procedural history of this case is for the most part set forth in the prior opinions rendered by this Court and by the Fifth Circuit Court of Appeals. Williams v. Blackburn, ___ F.Supp. ___ (M.D.La. 1981), aff. Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981), affirmed, rehearing en banc, Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982). Thereafter, the United States Supreme Court denied petitioner's application for a writ of certiorari. Williams v. Maggio, __ U.S. ___, 103 S.Ct. 3353, 77 L.Ed.2d ___ (1983). On July 14, 1983, Justice Brennan stayed the effect of the denial of certiorari. On September 8, 1983, the United States Supreme Court denied petitioner's application for a rehearing of the Court's denial of petitioner's application for a writ of certiorari. Williams v. Maggio, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d ___, 33 CrL 4163 (1983). Thereafter, Judge Frank Foil of the Nineteenth Judicial District Court for the Parish of East Baton Rouge issued a Warrant of Execution of Person Condemned on September 20, 1983, directing that petitioner be executed on October 25, 1983, between the hours of 12:00 o'clock midnight and 3:00 a.m. Petitioner then filed an application for a writ of habeas corpus with the Nineteenth Judicial District Court raising the very same issues he now urges in the federal application for writ of

habeas corpus now pending before this Court. On October 4, 1983, Judge Frank Foil denied petitioner's state court application for writ of habeas corpus. On October 14, 1983, petitioner filed an application for a writ of habeas corpus with the Louisiana Supreme Court together with a request for a stay of execution. The Louisiana Supreme Court unanimously denied petitioner's application for a stay of execution and also unanimously denied petitioner's application for a writ of habeas corpus. Petitioner then filed the pending application for a writ of habeas corpus with the United States District Court for the Middle District of Louisiana. Thus, the Court finds petitioner has exhausted his available state remedies.

II. ISSUES RAISED BY PETITIONER

Petitioner raises four grounds for review in this latest application for a stay of execution and writ of habeas corpus. Petitioner contends that his federally protected rights were violated in the following manner:

(1) The Louisiana Proportionality Review in death penalty cases does not meet constitutional standards, and the review made by the Louisiana Supreme Court is inconsistent and disproportionate under the facts and circumstances of petitioner's case.

(2) The death sentence was imposed as a result of the prosecutor's improper closing argument during the sentencing phase of the trial.

(3) Petitioner's death sentence was improper because the jury was instructed on all responsive verdicts to first degree murder even though there was no evidentiary support for a manslaughter verdict.

(4) Petitioner was deprived of an impartial jury composed of a fair cross section of the community insofar as the guilt or innocence phase of the trial because of the manner the jurors were selected and impanelled.

III. STANDARD OF REVIEW IN A HABEAS CORPUS ACTION

As is previously set forth in this opinion, this is the second application for a writ of habeas corpus filed with this Court. Some thirteen issues were raised in petitioner's first application. An additional four issues are raised in the current application. Without deciding the issue of whether petitioner is guilty of "abuse of the writ" insofar as the filing of successive applications for a writ of habeas corpus is concerned, the Court shall follow the guidelines set forth by the United States Supreme Court in Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 77 L.Ed.2d ___ (1983) in resolving the issues raised in this latest application. In Barefoot, the Court stated:

> "Second and successive federal habeas corpus petitions present a different issue. 'To the extent that these involve the danger that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic, the State has a quite legitimate interest in preventing abuse of the writ.' * * * Rule 9(b) of the Rules Governing §2254 Cases states that 'a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief. . . [or if] the failure of the petitioner to assert

> those grounds in a prior petition constituted an abuse of the writ.' * * * Even where it cannot be concluded that a petition should be dismissed under Rule 9(b), it would be proper for the district court to expedite consideration of the petition. The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." 103 S.Ct. 3395.

It is clear that "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception." Id., 103 S.Ct. at 3391. Barefoot emphasizes that when a petitioner under imminent threat of execution has alleged a substantial denial of a federal right, he must be afforded an adequate opportunity to present the merits of his argument, and he must receive a considered decision on the merits of his claim. Id. 103 S.Ct. at 3394. Thus, the Court in this case has expedited its consideration of petitioner's allegations. The entire state court record has been filed with this Court. A list of all inmates who have been sentenced to death and are currently housed on Death Row at the Louisiana State Penitentiary at Angola has been obtained by the Court[1] and has been filed in the record, together with the citation of each of the 25 cases for which there is a reported decision by the Louisiana Supreme Court.[2] The Court has also required the State of Louisiana to file a response to petitioner's application which has also been considered by the Court. The Court has had adequate time and means for rendition of a considered judgment on the

merits prior to the scheduled execution date. Id., 103 S.Ct. at 3394. It is clear that whether a stay is granted depends "on the probability of success on the merits," Id., 103 S.Ct. at 3392 and stays of execution are not automatic pending the filing and consideration of an appeal to the appellate court or a petition for a writ of certiorari to the Supreme Court. "When the process of direct review - which, if a federal question is involved, includes the right to petition [the Supreme] Court for a writ of certiorari - comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." Id. 103 S.Ct. at 3391. Petitioner's case has twice been reviewed by the United States Supreme Court, with the latest review having occurred on September 8, 1983. Thus, the Court shall review the merits of each of petitioner's contentions.

IV. PETITIONER'S CONTENTIONS

A. Proportionality Review of Death Sentence

Petitioner first contends that the proportionality review of his death sentence has been conducted in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. More specifically, petitioner contends the Louisiana Supreme Court conducted

the proportionality review in his case on a district wide basis, State v. Williams, supra, 383 So.2d at 374-375, while in two other cases, State v. Narcisse, 426 So.2d 118 (La. 1983) and State v. Moore, 432 So.2d 209 (La. 1983), the Louisiana Supreme Court conducted proportionality reviews on a state wide basis. Petitioner contends that the issue of the nature and scope of proportionality review is presently before the United States Supreme Court. See Pulley v. Harris, 692 F.2d 1189 (9th Cir, 1982), cert. granted, 103 S.Ct. 1425, ___ U.S. ___ (1983); Autry v. Estelle, ___ U.S. ___ (1983). Thus, petitioner argues that a stay of execution be granted pending a decision by the United States Supreme Court in the Pulley case. Petitioner also seeks to have the Court vacate petitioner's death sentence and to order a new sentencing hearing or, alternatively, seeks to have the Court review petitioner's death sentence on a state wide basis. The Court does not believe the Court is required to stay all proceedings herein pending a decision by the United States Supreme Court in the Pulley case. On October 11, 1983, the United States Supreme Court denied petitions for writs of certiorari in two cases from Louisiana which raised the proportionality issue, Lindsey v. Louisiana, 428 So.2d 420 (La. 1982), writ denied, ___ U.S. ___ (U.S. S.Ct. Docket No. 82-6973); James v. Louisiana, 431 So.2d 399 (La. 1983), writ denied, ___ U.S. ___ (U.S. S.Ct. Docket No. 83-5366). Furthermore, a new sentence

hearing is not required under the facts of this case. While the Court believes that the district-by-district proportionality review approved and found constitutionally sound by the Louisiana Supreme Court, by an en banc panel of the Fifth Circuit Court of Appeals and by this Court is still constitutionally acceptable, the Court shall grant petitioner's alternative request to review petitioner's death sentence on a state wide basis.

There are currently twenty-seven inmates on death row at the Louisiana State Penitentiary at Angola. Of these twenty-seven inmates, twenty-three inmates, including the petitioner, have appealed their cases to the Louisiana Supreme Court which has written and published formal opinions.[3] Four inmates on death row are apparently still on appeal and no written decision could be found on their cases.[4] Two other written opinions[5] involving death sentences imposed on defendants from East Baton Rouge Parish have also been reviewed by the Court. The Court has carefully reviewed the facts of each of these twenty-five published opinions in which the death penalty was imposed. After reviewing each of these 25 cases and comparing the facts set forth in these cases to petitioner's case, the Court must and does conclude that whether the standard of review is on a district-by-district standard or on a state wide standard, the death penalty imposed in petitioner's case is not disproportionate to the death penalty imposed in similar cases wherein the jury

found armed robbery, offenses committed in an especially heinous, atrocious or cruel manner, and knowingly creating a risk of death or great bodily harm as aggravating circumstances as required by Article 905.4 of the Louisiana Code of Criminal Procedure. The Court further finds and concludes that the jury in petitioner's case did not act arbitrarily in comparision with the verdicts returned by other juries in similar cases in Louisiana which recommended the death penalty.[6] In seventeen of the twenty-five reported cases involving the death penalty in Louisiana, the jury which recommended the death penalty found armed robbery as one if not the only statutory aggravating circumstance. These seventeen death sentences were returned in ten of the thirteen parishes[7] wherein death sentences have been recommended by juries. A review of the reported cases also reveals that the two other aggravating circumstances found by the jury to exist in petitioner's case were also found to exist by other juries which recommended death sentences.

The circumstances surrounding the murder committed by the petitioner reveal a reckless disregard for the life of other human beings. As the reported facts of this case reveal, petitioner shot Willie Kelly, a 67-year old black security guard, with a 12-gauge sawed-off shotgun in the face at point blank range. After killing Mr. Kelly and committing the armed robbery, petitioner shot two other people in the feet.

The Court finds that the death penalty imposed in petitioner's case is not disproportionate to the death penalty imposed in the other sixteen cases wherein armed robbery was found to be an aggravating circumstance considering the circumstances involved in petitioner's case.

Therefore, the Court concludes that petitioner's first contention challenging the manner in which his death sentence was reviewed to be without merit.

B. Was the Prosecutor Guilty of Misconduct During Closing Arguments?

Petitioner contends the prosecutor's closing and rebuttal arguments at the sentencing phase of petitioner's bifurcated trial constituted flagrant misconduct because the argument:

(1) conveyed a message which tended to lessen the jury's responsibility;

(2) contained misstatements and misrepresentations of the law on review of death sentences by appellate courts;

(3) contained inflammatory statements to the jury;

(4) exceeded the scope of Article 774 of the Louisiana Code of Criminal Procedure; and

(5) was fundamentally unfair.

The standard for reviewing prosecutorial misconduct in a habeas corpus case is whether the prosecutor's actions are of such a nature as to render the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Thus, "Donnelly teaches that in a Section 2254 proceeding more than undesirability or even 'universal

condemnation' must be shown unless a specific guarantee of the Bill of Rights is involved, it must be shown that the remarks were so prejudicial that they rendered the trial in question fundamentally unfair." Cobb v. Wainwright, 609 F.2d 754,755 (5th Cir. 1980). Determining whether the challenged remarks had this effect turns on an assessment of the remarks within the context of the particular trial. Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980).

It must be noted that at no time did defense counsel lodge an objection to the content of the closing argument. In most cases the Court would find that a failure to object would constitute a waiver. See C.Cr.P. Art. 841. However, since this is a capital case, the obligation to examine the record for passion, prejudice or arbitrary factors which would have made the sentencing hearing "fundamentally unfair" is proper.

Applying the "fundamentally unfair" standard set forth above, the Court finds that in light of the considerable strength of the case against Williams, the prosecutor's comments did not reach the level which made the trial fundamentally unfair in the sentencing phase.

Article 774 of the Louisiana Code of Criminal Procedure provides that closing argument shall be confined to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom and to the law applicable to the case. The argument shall not appeal

to prejudice. The state's rebuttal shall be confined to answering the argument of the defendant." Petitioner now argues that the cumulative effect of the prosecutor's argument inflicted the penalty verdict with arbitrariness, prejudice and passion. This argument is without substance or merit and is not supported by the record. An intelligent jury could not have reasonably believed the prosecutor was urging them to ignore the law and base their decision simply on their emotional response to the crime. The prosecutor argued that drug addiction should not be considered as a mitigating factor in the crime; the death penalty was justified because of its deterrent effect; the responsibility of the jury was serious; and that this particular crime justified the imposition of the death penalty. The argument did not appeal to prejudice or to passion. There was no introduction of arbitrary factors which might have tainted the verdict. It is not improper to remind a jury of its solemn obligation and its awesome responsibility, or the importance of the task at hand.

While the prosecutor did on occasion give his version of the evidence and his recommendation, he did not personally vouch for the credibility of witnesses. A review of the closing argument made by counsel for petitioner reveals that similar arguments were made in petitioner's defense.[8]

Furthermore, there is no error of law in the jury charge given by the trial judge at both the guilt and sentencing phases of the trial.[9]

Therefore, the Court finds petitioner's argument that the prosecution was guilty of improper conduct to be without merit.

C. Was the Death Sentence Imposed in Violation of Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982)?

Petitioner contends the trial judge erred because he gave the jury an instruction on all of the responsive verdicts to first degree murder even though there was no evidentiary support for a manslaughter verdict. Petitioner relies on Hopper v. Evans, supra. Such reliance is misplaced under the facts of this case.

No objection was made to this part of the jury charge by the petitioner at the time of his trial. Under Article 801 of the Louisiana Code of Criminal Procedure, a party who fails to object to a charge "may not assign as an error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made". However, the Court will consider petitioner's argument despite his failure to object.

Article 803 of the Louisiana Code of Criminal Procedure provides that when "a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 or 815, the Court shall charge the jury as to the law applicable to each offense." When "there are several grades of an offense contained in a single count, the Court shall charge the

jury as to each grade of which the defendant could be found guilty." C.Cr.P. Art. 804(B). Under Article 809, "the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated." Article 814(A)(1) provides that the "only responsive verdicts which may be rendered where the indictment charges the following offenses are: 1. First Degree Murder: Guilty. Guilty of Second Degree Murder. Guilty of Manslaughter. Not Guilty." Finally, Article 814(C) provides that upon the "motion of the state or the defense, the Court may, in its discretion, exclude a responsive verdict listed in Subarticle A if after all the evidence has been submitted there is no evidence to establish that responsive verdict." Neither the state nor the petitioner requested the Court to exclude manslaughter as a responsive verdict. Furthermore, a review of the record fails to reveal that there was "no evidence to establish" the responsive verdict of manslaughter. The trial judge complied with the mandate set forth in Hopper v. Evans, supra, and with Louisiana law. Thus, petitioner's argument on this issue is hereby denied.

D. The Need for an Evidentiary Hearing to Determine Whether the Jury Selected was Conviction Prone

Petitioner contends that the manner in which juries are empanelled in Louisiana makes the juries "death qualified" and conviction prone. Petitioner seeks to have an evidentiary

hearing to support this argument. In support of his argument, petitioner relies on Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980) and the memorandum opinion in the same case rendered by a district judge on August 5, 1983. The Court finds the Grigsby case is not applicable herein, and thus, no evidentiary hearing is required.

Petitioner's argument that the manner in which Louisiana juries are empanelled makes the jury "death qualified" and more prone to convict was rejected by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) wherein the Court concluded that most of the very same evidence and studies which petitioner now seeks to introduce at this time were speculative at best and in fact, "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." Id., 88 S.Ct. at 1774.

Furthermore, petitioner challenged the manner in which the jury was empanelled in his earlier appeals and applications for a writ of habeas corpus. The Fifth Circuit Court of Appeals in its en banc opinion devoted many pages of the opinion on this issue and found the jury selection procedure to be constitutionally proper. The Court believes the jury in this case was properly and constitutionally empanelled. Therefore, petitioner's challenge to the jury is without merit.

V SUMMARY AND CONCLUSION

The Court has very carefully and meticulously reviewed each of the arguments urged by petitioner in this latest application for a writ of habeas corpus. In so doing, the Court has again reviewed the entire record, including the state court record. The Court must and does conclude that it can find no error of any kind which would in any way cause this Court to stay the execution of petitioner which is set for October 25, 1983, or to grant petitioner's application for a writ of habeas corpus. This Court is totally and completely satisfied that petitioner has been accorded all of the constitutional rights to which he is entitled under our system of justice. Petitioner's case has been reviewed on many occasions by many courts, judges and justices. The state trial judge has reviewed the case on a motion for a new trial and on two separate post-conviction applications. The Louisiana Supreme Court has reviewed petitioner's application on three separate occasions, once on direct appeal and twice on applications for a writ of habeas corpus. This Court has now reviewed petitioner's case on two occasions. The Fifth Circuit Court of Appeals has reviewed petitioner's case on one occasion, which also included an en banc review by the Circuit Court. The United States Supreme court has reviewed petitioner's case on two occasions, with the last review coming shortly over one month ago on September 8, 1983. In fact, an application for rehearing was also considered by the United States Supreme Court before it rendered its

decision on September 8, 1983. Not a single court which has reviewed petitioner's arguments on direct appeal or on applications for post conviction relief has found petitioner's claims valid. Thus, the Court concludes it would serve no useful purpose to delay these proceedings in order to conduct an evidentiary hearing on petitioner's complaints.

> "Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely . . . 'It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.'" Barefoot v. Estelle, supra, 103 S.Ct. at 3391.

The Legislature, in its wisdom, has passed legislation which allows juries to recommend the death penalty as one sentencing alternative in first degree murder cases. Very detailed and constitutionally approved procedures have been established by the Legislature and the courts to be followed before a jury can recommend a death sentence. These procedures were carefully and meticulously followed in this case. A jury composed of citizens of East Baton Rouge Parish has recommended the death sentence. The Courts, including this Court, have affirmed the judgment of the state court. The sentence mandated by Louisiana law should be carried out without further delay and interference from this Court or any other court.

Therefore, petitioner's application for a stay of execution is denied. Petitioner's application for a writ of habeas corpus is also denied.

VI CERTIFICATE OF PROBABLE CAUSE

Petitioner also seeks a certificate of probable cause in order that he may file an appeal with the Fifth Circuit Court of Appeals. A "certificate of probable cause requires petitioner to make a 'substantial showing of denial of [a] federal right. Barefoot v. Estelle, supra, 103 S.Ct. at 3394. The "severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate." Id., 103 S.Ct. at 3394. Finally, a certificate of probable cause should not issue where the Court finds the appeal is frivolous and entirely without merit." Id., 103 S.Ct. 3394. For reasons previously set forth in this opinion the Court finds that since petitioner has failed to make a substantial showing of a denial of a federal right, petitioner's application is frivolous and without merit. Therefore, petitioner's request for a certificate of probable cause to appeal and stay execution pending appeal is hereby denied.

VII. ORDER OF COURT

For reasons set forth above:

IT IS ORDERED that the motion of Robert Wayne Williams for a stay of execution be and it is hereby DENIED.

IT IS FURTHER ORDERED that petitioner's application for a writ of habeas corpus be and it is hereby DENIED.

IT IS FURTHER ORDERED that the motion of Robert Wayne Williams for a certificate of probable cause be and it is hereby DENIED.

IT IS FURTHER ORDERED that the motion of Robert Wayne Williams for a stay pending appeal be and it is hereby DENIED.

IT IS FURTHER ORDERED that the Clerk of Court shall immediately notify the parties of the Court's decision in this case.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, October 21, 1983.

Frank J. Polozola
UNITED STATES DISTRICT JUDGE

Footnotes

1. See Court Exhibit 1 entitled "Death Row Inmates".

2. State v. Baldwin, 388 So.2d 664 (La. 1980).
State v. Berry, 391 So.2d 406 (La. 1980).
State v. Brogdon, 426 So.2d 158 (La. 1983).
State v. David, 425 So.2d 1241 (La. 1983).
State v. Felde, 422 So.2d 370 (La. 1982).
State v. James, 431 So.2d 399 (La. 1983).
State v. Knighton, La.Supr.Ct. No. 82-KA-0097(1983).
State v. Lindsey, 428 So.2d 420 (La. 1982).
State v. Lloyd, 425 So.2d 710 (La. 1982).
State v. Martin, 376 So.2d 300 (La. 1979).
State v. Mattheson, 407 So.2d 1150 (La. 1981).
State v. Monroe, 397 So.2d 1258 (La. 1981).
State v. Moore (Alvin R.), 414 So.2d 340 (La. 1982).
State v. Moore (Avery "Pete"), 432 So.2d 209 (La. 1983).
State v. Narcisse, 426 So.2d 118 (La. 1983).
State v. Perry, 420 So.2d 139 (La. 1982).
State v. Prejean; 379 So.2d 240 (La. 1979).
State v. Sawyer, 422 So.2d 95 (La. 1982).
State v. Sonnier, 402 So.2d 650 (La. 1981).
State v. Taylor, 422 So.2d 109 (La. 1982).
State v. Watson, 423 So.2d 1130 (La. 1982).
State v.(Robert W.)Williams, 383 So.2d 369 (La. 1980).
State v. Willie, 436 So.2d 553 (La. 1983).

In addition to the above cases, two additional cases from East Baton Rouge Parish have been considered and reviewed by the Louisiana Supreme Court in reported decisions: State v. Colin Clark, 387 So.2d 1124 (La. 1980); State v. Williams, 392 So.2d 619 (La.1980). In each of the above cases, only the citation from the Louisiana Supreme Court is set forth.

3. See Footnote 2 above.

4. State v. Fuller; State v. Glass; State v. Hamilton; and State v. Kirkpatrick.

5. State v. Clark, supra; State v. Williams, supra.

6. Baldwin, Berry, Clark, David, James, Knighton, Lindsey, Mattheson, Alvin Moore, Avery Moore, Narcisse, Perry, Sonnier, Taylor, Watson, Robert Williams and James Williams.

7. East Baton Rouge, Orleans, Lafayette, Rapides, Ouachita, St. Charles, Bossier, Jefferson, Calcasieu and St. Mary Parishes

8. Trial transcript pp. 282-287.

9. Trial transcript pp. 248 et seq.; pp. 299 et seq.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

ROBERT WAYNE WILLIAMS,

Petitioner,

vs.

JOHN T. KING, Secretary,
Louisiana Department of Corrections, and
ROSS C. MAGGIO, JR., Warden,
Louisiana State Penitentiary, Angola,
Louisiana,

Respondents.

APPLICATION FOR A STAY OF EXECUTION

To the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Petitioner Robert Wayne Williams prays that an order be entered staying the execution of his death sentence presently scheduled to occur on Wednesday, December 14, 1983, between midnight and 3:00 A.M. Central Daylight Time. This stay is sought pursuant to 28 U.S.C. §§ 2101(f) and 2251, pending final disposition of his petition for a writ of certiorari, which was also filed today. In support of this application, petitioner respectfully notes as follows:

In light of the Court's prior actions on the petitions and applications previously filed by Robert Wayne Williams, I would be inclined to grant the instant petition for certiorari and would be inclined to vote to grant the request for a stay if it is denied.

Byron R. White
12/10/83

1. At a jury trial on April 18, 1979, in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana, petitioner was convicted of capital murder. Judgment was entered fixing his punishment at death.

2. On April 17, 1980, the Supreme Court of Louisiana affirmed petitioner's conviction and sentence on direct appeal. State v. Williams, 383 So.2d 369 (La. 1980). His petition for rehearing was denied on May 19, 1980, and this Court denied certiorari on January 12, 1981. Williams v. Louisiana, 449 U.S. 1103, reh. denied, 450 U.S. 971 (1981).

3. On March 20, 1981, petitioner returned to the state trial court and filed an Application for Post-Conviction Relief. Without conducting an evidentiary hearing, the court dismissed his application in an unpublished order on March 24, 1981. Two days later, with two justices acknowledging that his claims were substantial and one other concluding that his case involved constitutional error, the Louisiana Supreme Court affirmed. State ex rel. Williams v. Blackburn, 396 So. 2d 1249 (1981).

4. The next day, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Louisiana. On the same day, without conducting an evidentiary hearing, in an unreported order and judgment, the district judge denied his petition. A panel of the United States Court of Appeals for the Fifth Circuit agreed, Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981). By a divided vote, the en banc court affirmed, Williams v. Blackburn, 679 F.2d 381 (5th Cir. 1982)(en banc), and this Court again denied review. Williams v. Blackburn, ___ U.S. ___ (June 27, 1983), reh. denied, ___ U.S. ___ (Sept. 8, 1983).

At that point, the state trial judge ordered petitioner's execution to take place in the early morning hours of October 25, 1983.

5. Between the commencement of petitioner's first habeas proceedings and the actions of this Court on September 8, 1983, significant changes in the relevant law caused petitioner to return to the courts for a second time to pursue post-conviction relief. The entire history of his successive petition spans little more than two months.

6. Petitioner filed his new Application in the state trial court on October 4, 1983. On the same day, it was summarily denied. The Louisiana Supreme Court affirmed on October 18, 1983, and refused to stay the impending execution.

7. Petitioner then filed a new writ of habeas corpus in the United States District Court for the Middle District of Louisiana. On October 21, 1983, the district judge entered an order dismissing the petition, denying a certificate of probable cause, and refusing to stay the execution. Williams v. King, No. 83-1120-B (M.D. La. Oct. 21, 1983)(Appendix A).

8. On appeal, with less than two days remaining before petitioner's scheduled execution, the Fifth Circuit granted the certificate of probable cause and affirmed the district court judgment, but stayed the execution pending certiorari in this Court. Williams v. Maggio, No. 83-3647 (5th Cir. Oct. 23, 1983)(Appendix B).

9. The state moved in this Court on October 24 to vacate the circuit court's stay. While petitioner's suggestions for rehearing and rehearing en banc on the merits were still pending in the Fifth Circuit, this Court granted the state's application, over three dissents. Maggio v. Williams, No. A-301 (U.S. Nov. 7, 1983) (Appendix C).

10. The state immediately obtained an order setting petitioner's execution for December 14, 1983.

11. The Fifth Circuit denied rehearing and rehearing en banc on November 29, 1983, without opinion.

12. The conviction and sentence of petitioner -- indeed, the entire course of the proceedings to date -- raise serious and substantial federal constitutional questions of which review has been sought in this Court. Among these are the following:

a. In a separate opinion concurring in the majority's decision to vacate the Fifth Circuit's stay, Justice Stevens characterized the majority as "applying a strict standard of review." Maggio v. Williams, No. A-301, slip op. at 4 (U.S. Nov. 7, 1983)(Stevens, J., concurring). Although he agreed that petitioner had raised a serious constitutional question and had actually suffered prejudice of constitutional dimension, Justice Stevens concluded that a "strict standard" was justified because the "essence" of the question had appeared and been rejected in prior proceedings. Id. at 4-5. This appears to be an accurate account of the majority view. See id. at 4-5 (majority opinion). Thus, both the majority and Justice Stevens imply that a lesser degree of care is warranted where a claim, tangentially related to one already litigated or arising out of the same facts, is renewed because of intervening changes in the law.

This view contradicts Sanders v. United States, 373 U.S. 1 (1963), and Rule 9 of the Rules Governing §2254 Cases, both of which authorities contemplate the legitimacy of successive petitions. See Autry v. Estelle, A-242, slip op. at 2 (U.S. Oct. 11, 1983)(White, Circuit Justice). Petitioner seeks a stay until the Court can clarify on certiorari the proper standard of review of successive petitions.

b. Although the state pleaded abuse of the writ (albeit only generally) in its opposition to petitioner's habeas petition in the district court, the court held no evidentiary hearing and made no such finding. See Rule 9 advisory

committee note. Instead, the court reached the merits of each claim. Nevertheless, when the state revived its defense before this Court, in its motion to vacate the stay, the majority concluded that petitioner's failure to raise certain of his claims in the earlier petition was "inexcusable." Maggio v. Williams, slip op. at 4. Justice Stevens made a similar "finding." Id. at 4 (concurring opinion).

Such findings disregard the apparent requirement of Rule 9 that abuse of the writ not be found without the petitioner being given an opportunity in the district court to show that in fact the writ was not abused. See Sanders v. United States, 373 U.S. at 10-11; Price v. Johnston, 334 U.S. 266, 291-92 (1948). Petitioner therefore requests a stay of execution pending the consideration on certiorari of the question whether an appellate finding that the writ was abused may properly be made without a record from the district court on that question.

c. At the close of petitioner's sentencing hearing, the prosecutor encouraged the jury to discount the significance of its decision to impose death by assuring them that any mistakes would be corrected on appeal. He also exhorted the jury to impose death to strike a blow in the general war on crime. As Justice Stevens observed, by any measure of common sense, petitioner was substantially prejudiced.

Nevertheless, both Justice Stevens and the majority concluded that close scrutiny of petitioner's constitutional objection to the prosecutor's argument was not warranted here because a related contention had been raised in the earlier petition. The majority concluded that, even though the failure to raise the instant claim in the first petition was "inexcusable," the district court had done all the Constitution required of it by considering the argument in light of Donnelly v. De Christoforo, 416 U.S. 637 (1974). Maggio v. Williams, slip op. at 4. Justice Stevens thought the question "serious," "especially ... when the death penalty is at stake," but somehow of diminished significance in a successive petition. Id. at 4 (concurring opinion).

However, in the period intervening between the first and second petitions, the Eleventh Circuit twice found virtually identical jury arguments unconstitutional under Donnelly. See Brooks v. Francis, No. 83-8028, slip op. at 12 (11th Cir. Sept. 15, 1983); Hance v. Zant, 696 F.2d 950 (11th Cir. 1983). The decision of the Fifth Circuit to find no error on such closely similar facts reflects the absence of any consistent construction of Donnelly between the Circuits. The discrepancy means the difference between life and death.

Petitioner maintains that a change in the law of another circuit which raises serious questions about the consistent, rational imposition of the death penalty is an appropriate new circumstance under Sanders to sustain the renewal of an earlier claim. Petitioner seeks a stay until the Court can consider whether certiorari should be granted to examine the circuits' conflicting standards for determining the constitutional limits of prosecutorial jury argument in a capital case.

d. Petitioner has challenged the manner by which the Louisiana Supreme Court conducts proportionality review. In his earlier petition, he objected to the failure of that court to conduct state-wide comparative review of his sentence. In his second petition, he expanded the claim to include the question whether the Louisiana high court has acted with constitutionally required consistency in conducting proportionality review, in light of intervening decisions in which it has, without explanation, varied the restricted scope of comparison employed in petitioner's case. See State v. Moore, 432 So. 2d 209, 226-27 (La. 1983)(random comparison of first-degree murder cases state-wide); State v. Narcisse, 426 So.2d 118, 138-39 (La. 1983)(comparison of first-degree murder cases in two judicial districts rather than the customary one). Petitioner seeks a stay until this Court can consider whether the Constitution requires at the least some consistent application of whatever form of proportionality review the state selects.

13. Petitioner is presently in the custody of the Warden of the Louisiana State Penitentiary in Angola, Louisiana. His execution is imminent. A stay of execution would neither prejudice the State of Louisiana nor interfere with petitioner's custodial status. Rather, it would merely assure that petitioner is not killed before the issues raised in his petition for certiorari can be heard and determined by this Court.

WHEREFORE, Petitioner respectfully requests an order staying his execution pending the disposition of his petition for certiorari.

Respectfully submitted,

SAMUEL S. DALTON, Esq.
2001 Jefferson Highway
Jefferson, Louisiana 70121
(504) 835-4289

Counsel for Petitioner

Dated: December 9, 1983

RECEIVED
DEC 10 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. A-450

IN THE
SUPREME COURT OF THE UNITED STATES
October Trem 1983

ROBERT WAYNE WILLIAMS,
Petitioner,

vs.

JOHN T. KING, Secretary,
Louisiana Department of Corrections, and
ROSS C. MAGGIO, JR., Warden,
Louisiana State Penitentiary, Angola,
Louisiana,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I have served the petitioner's Petition for A Writ of Certiorari and Application for a Stay of Execution upon the respondent by placing a copy in the United States Mail, first class, postage prepaid, addressed as follows:

Kay Kirkpatrick, Esq.
Assistant Attorney General
222 St. Louis Street
Suite 529
Baton Rouge, Louisiana 70801

All parties required to be served have been served.

Done this 9th day of December, 1983.

Deval L. Patrick
on behalf of
Samuel S. Dalton, Esq.

APPENDIX B

IN T[illegible] UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3647

ROBERT WAYNE WILLIAMS,
Petitioner-Appellant,

versus

JOHN T. KING, Secretary
of the Department of Corrections
and ROSS MAGGIO, JR., Warden,
Louisiana State Penitentiary,
Respondents-Appellees.

U.S. COURT OF APPEALS
FILED
NOV 28 1983
GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court for the
Middle District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 23, 1983, 5 Cir., 198_, _____F.2d____)

(NOVEMBER 28, 1983)

Before BROWN, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
United States Circuit Judge

REHG-6

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

October 24, 1983

TO ALL PARTIES LISTED BELOW

No. 83-3647 - Robert Wayne Williams -vs-
John T. King, Etc.

(USDC NO. CA-83-1120-B)

Enclosed is a revised copy of the Court's order entered in the above cause on October 23, 1983. The revision in the order appears in the first sentence of the last paragraph on page eight.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Barry W. Stiebing
Barry W. Stiebing, Chief
Judicial Support Division

BWS/ml

Enclosures

Honorable Frank J. Polozola
Mr. C. Lee DuPuis, Clerk
Mr. Samuel S. Dalton
Mr. William J. Guste, Jr.
Ms. Kay Kirkpatrick
Mr. Ross Maggio, Warden
Governor David C. Treen
Mr. Alexander L. Stevas, Clerk

REVISED - October 24, 1983

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
OCT 23 1983
GILBERT F. GANUCHEAU
CLERK

No. 83-3647

Robert Wayne Williams,

Petitioner-Appellant,

v.

Ross Maggio, Warden of the State Penitentiary,

Respondent-Appellee

Appeal from the United States District Court
for the Middle District of Louisiana

Before BROWN, REAVLEY, and HIGGINBOTHAM, Circuit Judges

BY THE COURT:

I.

Robert Wayne Williams seeks a certificate of probable cause and stay of his execution now set for Tuesday, October 25, 1983 between the hours of midnight and three a.m.

II.

Robert Wayne Williams was convicted in the state courts of Louisiana on April 19, 1979 of first degree murder and was

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By _____ Deputy
New Orleans, Louisiana OCT 24 1983

sentenced to death by a jury. His conviction and sentence were afffirmed on direct appeal by the Louisiana Supreme Court, State v. Williams, 383 So. 2d 369 (La. 1980), and certiorari was denied by the United States Supreme Court, Williams v. Louisiana, 101 S. Ct. 899 (1981),

Subsequently, petitioner filed a writ of habeas corpus in the Louisiana state court for the Nineteenth Judicial District on March 20, 1981. Denial of that writ was affirmed by the Louisiana Supreme Court on March 26, 1981. See State ex rel Williams v. Blackburn, 369 So. 2d 1249.

Petitioner then filed for federal habeas corpus relief in the District Court for the Middle District of Louisiana. Judge Polozola denied his writ on March 27, 1981, and Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The original panel in the Fifth Circuit upheld the lower court decision, Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981). After a rehearing en banc with oral argument, the petition was again denied in June, 1982. See Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982). A petition for rehearing of the en banc decision was denied on August 12, 1982. Id.

Petitioner applied for a writ of certiorari in December of 1982. That petition was denied June 27, 1983, and his application for rehearing was denied on September 8, 1983 (after a stay granted by Justice Brennan on July 14, 1983). Williams v. Maggio, U.S.___, 103 S.Ct. 3553. Judge Foil, the State Trial Judge, issued a warrant for Petitioner's execution

to take place on October 25, 1983 between the hours of twelve midnight and three a.m.

On October 4, 1983 the Petitioner filed a second petition for a writ of habeas corpus in the Nineteenth Judicial District Court. That petition was denied by Judge Foil on that same day.

On October 14, 1983, the Petitioner filed a subsequent petition for writ of habeas corpus with the Louisiana Supreme Court. That petition was denied on October 18, 1983.

On October 20, 1983, the petitioner filed this second petition for writ of habeas corpus with the United States District Court for the Middle District of Louisiana. This petition was denied on October 21, 1983 by Judge Polozola in a written order.

III.

Williams now makes four arguments:

1. The Louisiana Supreme Court's practice of conducting only district-wide, rather than state-wide, proportionality review of death sentences is

unconstitutional.

2. The prosecutor's inflammatory remark at the close of the sentencing phase elicited a decision based on passion, not reason.

3. The trial judge incorrectly instructed the jury on the lesser included offense of manslaughter, on which there was no evidence.

4. Petitioner's jury was neither impartial, nor a representative cross-section of the community ,in violation of his sixth amendment rights.

IV.

1. We agree with the District Court with regard to claims 2, 3, and 4, and turn to claim number 1.

2. In December 1982, the Ninth Circuit overturned the death sentence for lack of a proportionality review. Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982). On March 21, 1983, the Supreme Court granted certiorari to consider two points regarding proportionality:

> (1) Does Constitution, in addition to procedures whereby trial court and jury impose death sentence, require any specific form of "proportionality review" by court of statewide jurisdiction prior to execution of state death judgment? (2) If so, what is the constitutionally required focus, scope, and procedural

structure of such review?

Pulley v. Harris, 51 U.S.L.W. 3590 (February 15, 1983, No. 82-1095).

On April 22, 1983, Alabama petitioned the Supreme Court to vacate a stay of execution granted to a prisoner, Evans, who argued the absence of a proportionality review of his sentencing by the Alabama courts. Over Justice Marshall's dissent that the Court had granted plenary review of the proportionality issue in Harris v. Pulley, Evans' stay was vacated, Alabama v. Evans, ___U.S.___, 103 S.Ct. 1736 (1983), and he was executed.

In July , 1983, Jimmy Lee Gray appealed to this Court to stay his execution, arguing, among other grounds, that:

> [I]n light of the Supreme Court's recent grant of certiorari on the issue of what form of proportionality review, if any, is constitutionally required in capital cases, this Court should grant the application in order to withhold judgment on this issue until such time as it can determined whether the narrow method used by the Mississippi Supreme Court to review petitioner's case passes constitutional muster.

Gray v. Lucas, 710 F.2d 1048, 1057 (5th Cir. 1983). We rejected that argument, holding:

> Gray urges that we should withhold decision pending the decision of the Supreme Court in Pulley v. Harris where it granted certiorari to determine whether review is constitutionally required and if so "what is the constitutionally required focus, scope and procedural structure of such review." See Pulley v. Harris, cert. granted, ___U.S.___, 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983). See 51 U.S.Law Week 3590. We note that a similar claim was raised in opposition to dissolve a stay in Alabama v. Evans, ___U.S.___,103 S.Ct. 1736, 75

L.Ed.2d 806 (1983), but the court declined to halt the execution.

Gray v. Lucas, 710 F.2d at 1057. On September 10, 1983, the Supreme Court denied certiorari, 52 U.S.L.W. 3169 (September 13, 1983), and Gray was executed.

On September 1, 1983, we refused in a divided panel to stay the execution of Baldwin, a Louisiana prisoner, rejecting his proportionality argument:

> The question Baldwin presents is whether the Louisiana Supreme Court, which under the Louisiana capital punishment statute reviews death sentences meted out by juries, violates the federal Constitution by reviewing those sentences on a district-by-district rather than a statewide basis. Even if the Court in Pulley decides that proportionality review is constitutionally required, we find no reasonable basis for concluding that the Court will require the state-wide review that we declined to require in Williams. This conclusion is reinforced by the denial of review, albeit now stayed, in Williams.

Baldwin v. Maggio, 715 F.2d 152, 155 (5th Cir. 1983) (footnote omitted). On September 27, 1983, the Supreme Court granted a stay, 52 U.S.L.W. 3259 (October 4, 1983).

On October 5, 1983, we rejected the last minute plea of David Autry that Texas failed to review his death sentence for proportionality, noting that a similar claim was raised in Alabama v. Evans, but that the Supreme Court had declined to halt that execution. Minutes before the scheduled execution, Justice White granted a stay, noting that, "in view of our decision to give [Harris v. Pully] plenary consideration, I cannot say that the [proportionality] issue lacks substance." 52 U.S.L.W. 3293

(October 11, 1983).

To these recitations of developments in other cases, including actions and inactions in the Supreme Court, we would add the developments in Williams' own case, because of a unique fact. That fact is that the Supreme Court may well conclude that it has already determined that Williams' claim No. 1 on proportionality is without merit. In the decision of the panel, 649 F.2d at 1021, we rejected Williams' claim of inadequate proportionality review. This was affirmed by the en banc court where we stated:

> Although the Supreme Court has referred to statewide reviews as commendable in the effort to insure against an arbitrary imposition of the death penalty, it has never implied that such review is a constitutional requirement. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The review quoted above provides adequate safeguards against freakish imposition of capital punishment. Just as a venire chosen from a cross-section of the community in which the crime is committed is an adequate constitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder convictions imposed within that venire community is sufficient to ensure against arbitrary imposition of the death penalty. We concur with the statement in the panel decision of this case that "we have heard nothing that would even hint at unconstitutionality, and wholly reject the argument." 649 F.2d at 1021.

Williams v. Maggio, 679 F.2d 381, 395 (5th Cir. 1982) (en banc). On June 27, 1983, the Supreme Court denied certiorari, ___U.S.___, 103 S.Ct. 3553 (1983). But that was not the end of it. A stay of the effect of the denial of certiorari was granted by Justice Brennan on July 14, 1983, pending determination of Williams'

petition for rehearing, which specifically requested that Court to delay its decision on the petition until it decided Harris v. Pulley. In the face of this and the described other developments, the Supreme Court on September 8, 1983 denied the petition for rehearing.

We must issue a certificate of probable cause and a stay pending full review unless we find that reasonable jurists could not disagree on the claims raised by the Petitioner. See Barefoot v. Estelle, ___U.S.___, ___, n.4, 103 S.Ct. 3383, n.4, 77 L.Ed.2d 1090, 1104 n.4 (1983).

We are not persuaded that Williams has been denied any constitutional right to a proportionality review of his sentence. We have explicitly so held, and as noted, the Supreme Court has not chosen to review that ruling, despite Williams' request that it do so. Nevertheless, other recent actions of the Court suggest the possibility that a complete review of the law on this matter may be anticipated. With a person's life at stake, we must await that review or further directions from the Supreme Court. For that reason, the requests for certificate of probable cause and stay of execution pending review are granted.

As to all claims we have carefully considered each of them, and we expressly find that each is without merit. We AFFIRM the District Court's judgment as to each.

A Certificate of Probable Cause and Stay of Execution are hereby GRANTED, and the judgment of the District Court is AFFIRMED.

Best Copy Available

APPENDIX C

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

November 7, 1983

Kay Kirkpatrick, Esq.
Assistant District Attorney
Nineteenth Judicial District
Baton Rouge, Louisiana 70801

RE: Ross Maggio, Warden, et al.
v. Robert Wayne Williams,
A-301

Dear Ms. Kirkpatrick:

The Court today granted the application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Fifth Circuit in order to allow the State to reschedule Williams' execution. See the attached per curiam opinion together with the opinion of Justice Stevens concurring in the judgment; the opinion of Justice Brennan, with whom Justice Marshall joins, dissenting; and the dissenting opinion of Justice Blackmun.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

Enc.
cc: Samuel S. Dalton, Esq.
Hon. David C. Treen
Hon. William J. Guste, Jr.
Gilbert F. Ganucheau, Esq.
Clerk, U. S. Court of Appeals
for the Fifth Circuit
(your No. 83-3647)
Barbara Ruttledge, Esq.
Clerk, Supreme Court of Louisiana
Clerk, U.S. District Court of MD of Louisiana
Clerk, District Court for the Parish of East Baton Rouge, LA

SUPREME COURT OF THE UNITED STATES

No. A-301

ROSS MAGGIO, WARDEN v. ROBERT WAYNE WILLIAMS

ON APPLICATION TO VACATE STAY

[November 7, 1983]

PER CURIAM.

On October 23, 1983, less than two days before Williams' scheduled execution, the Court of Appeals for the Fifth Circuit stayed the execution "pending final action of the Supreme Court." Because we agree with applicant that the stay was improvidently imposed, we grant his motion to vacate the stay and to allow the State to reschedule Williams' execution.

I

Williams was sentenced to death for killing a security guard while robbing a grocery store in Baton Rouge, Louisiana. His conviction and sentence were affirmed by the Louisiana Supreme Court. *State* v. *Williams*, 383 So. 2d 369 (1980). After we denied Williams' petition for certiorari, 449 U. S. 1103 (1981), and his request for rehearing, 450 U. S. 971 (1981), he unsuccessfully sought a writ of habeas corpus in the Louisiana state courts. He then filed his first application for habeas corpus in the District Court for the Middle District of Louisiana, presenting the same 13 issues that had proved unavailing in the state courts. The District Court held no hearing, but issued a written opinion denying Williams' petition. *Williams* v. *Blackburn*, 649 F. 2d 1019, 1021–1026 (CA5 1981) (incorporating District Court's decision). The District Court's judgment was affirmed by a panel of the Court of Appeals for the Fifth Circuit, but an order was entered directing that the appeal be reheard en

banc. On rehearing, the en banc Court of Appeals rejected each of Williams' many objections to his conviction and sentence and affirmed the judgment of the District Court. *Williams v. Maggio*, 679 F. 2d 381 (1982) (en banc). On June 27, 1983, we again denied Williams' petition for certiorari, —— U. S. ——, and we denied his request for rehearing on September 8, 1983, —— U. S. ——.

After unsuccessfully renewing his attempt to win relief in the state courts, Williams filed a second petition for habeas corpus in the District Court, raising two claims that had previously been rejected and two additional claims. The District Court issued a detailed opinion in which it refused to grant the writ or to stay Williams' execution. Because it believed Williams' contentions to be "frivolous and without merit," the District Court also denied his request for a certificate of probable cause, which, under 28 U. S. C. § 2253, is a prerequisite to an appeal. The Fifth Circuit granted a certificate of probable cause and affirmed the judgment of the District Court, but nevertheless issued a stay. The court reviewed Williams' claims and "expressly [found] that each is without merit." *Williams v. Maggio*, No. 83-3647, slip op., at 8 (Oct. 12, 1983). In light of recent actions by this Court, however, the Court of Appeals concluded with respect to Williams' "proportionality" claim that "a complete review of the law on this matter may be anticipated. With a person's life at stake, we must await that review or further action from the Supreme Court." *Ibid.*

II

Just last Term, we made clear that we would not automatically grant stays of execution in cases where the Court of Appeals had denied a writ of habeas corpus. *Barefoot v. Estelle*, 463 U. S. ——, —— (1983). A stay application addressed to a Circuit Justice or to the Court will be granted only if there exists "'a reasonable probability that four members of the Court would consider the underlying issue suffi-

ciently meritorious for the grant of certiorari or the notation of probable jurisdiction.'" *White* v. *Florida*, 458 U. S. ——, —— (1982) (POWELL, J., in chambers) (quoting *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1306 (1974) (POWELL, J., in chambers)). We perceive no reason to apply a different standard in determining whether a stay granted by a Court of Appeals pending disposition of a petition for certiorari to this Court should continue in effect.

The grounds on which Williams would request certiorari are amply evident from his opposition to the motion to vacate the stay, his voluminous filings in the lower courts, and the opinions and proceedings in the District Court and Court of Appeals. None of these claims warrant certiorari and plenary consideration in this case. Accordingly, we conclude that the stay, which the Court of Appeals apparently granted in view of the possibility that we would disagree with its analysis of the constitutional issues raised by Williams, should be vacated.

Williams' claims may be summarized briefly. He argues, first, that the Louisiana Supreme Court reviewed the proportionality of his death sentence on a district-wide rather than a state-wide basis, and that such review does not adequately ensure that his death sentence has been imposed in a rational and nonarbitrary manner. Second, the prosecutor's closing argument allegedly prejudiced the jury against Williams and elicited a decision based on passion rather than reason. Third, the trial court's instruction on lesser offenses, given despite the absence of evidence warranting such an instruction, is claimed to have violated the rule established in *Hopper* v. *Evans*, 456 U. S. 605 (1982), and to have denied Williams due process. Fourth, the exclusion for cause of three veniremen who opposed the death penalty at the guilt-innocence phase of Williams' trial, although proper under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), allegedly deprived Williams of a jury representative of a fair cross-section of the community.

Williams' second, third, and fourth contentions warrant little discussion. As Williams made clear in his second petition for state habeas corpus, he challenged the prosecutor's closing argument, either directly or indirectly, in his first state habeas proceeding. The Louisiana Supreme Court ultimately rejected his challenge, although two Justices indicated that the prosecutor's statements raised a substantial question and one concluded that the statements constituted reversible error. *State ex rel. Williams* v. *Blackburn*, 396 So. 2d 1249 (1981). Williams' failure to raise this claim in his first federal habeas proceeding is inexcusable, but the District Court nevertheless gave it full consideration in the second federal habeas proceeding. Applying the standard established in *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), the District Court examined the prosecutor's closing argument at length and concluded that it did not render Williams' trial fundamentally unfair.

The trial court's instruction on lesser offenses was clearly proper under state law, and the District Court's review of the record led it to conclude that the evidence fully justified the trial court's charge.

Williams' challenge to the exclusion for cause of certain veniremen was previously rejected by the Fifth Circuit and was presented to this Court in his petitions for certiorari and his motion for rehearing following the denial of his second petition. He has now recast his argument as an attack on the representativeness of the jury that convicted him. In *Witherspoon*, we found the extant evidence insufficient to demonstrate that "the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U. S., at 518. Williams claims that he is entitled to a hearing on the question whether the jury selection procedures followed here had these effects. But he has not alleged that veniremen were excluded for cause on any broader basis than authorized in *Witherspoon*. The District Court

characterized the evidence proffered by Williams or the question whether the jury was less than neutral with respect to guilt as tentative and fragmentary, and we cannot conclude that it abused its discretion in refusing to hold an evidentiary hearing on this issue. Further review is not warranted.

Williams' challenge to the Louisiana Supreme Court's proportionality review also does not warrant the issuance of a writ of certiorari. The en banc Fifth Circuit has carefully examined the Louisiana Supreme Court's procedure and found that it "provides adequate safeguards against freakish imposition of capital punishment." *Williams* v. *Maggio*, 679 F. 2d, at 396. This conclusion was challenged in this Court in Williams' petition for certiorari following the Court of Appeals' decision and in his motion for reconsideration of our denial of that petition. We were, of course, fully aware at that time that we had agreed to decide whether some form of comparative proportionality review is constitutionally required. See *Pulley* v. *Harris*, 460 U. S. —— (1983).

Since agreeing to decide this issue in *Pulley*, the Court has consistently denied challenges to the Louisiana Supreme Court's proportionality review scheme that were identical to that raised by Williams. See *Lindsey* v. *Louisiana*, 464 U. S. —— (1983); *James* v. *Louisiana*, 464 U. S. —— (1983); *Sonnier* v. *Louisiana*, 463 U. S. ——, rehearing denied, 464 U. S. —— (1983). See also *Narcisse* v. *Louisiana*, 464 U. S. —— (1983). Applicant asserts that his execution should be stayed because we have issued a stay in another Louisiana death case, *Baldwin* v. *Maggio*, 464 U. S. —— (1983). But our decision there turned not on the substantiality of applicant's *Pulley* argument, but on the fact that applicant raised a substantial challenge to the effectiveness of his trial counsel, similar to those we shall resolve in two cases set for argument this Term. *Strickland* v. *Washington*, 462 U. S. —— (1983); *United States* v. *Cronic*, 459 U. S. —— (1983).

As Williams notes, JUSTICE WHITE recently granted a stay in a case raising a proportionality challenge to a death sentence imposed in Texas. *Autry* v. *Estelle*, 464 U. S. —— (1983). Also, on October 31, the Court declined to vacate that stay. In that case, however, the Texas Court of Criminal Appeals, like the California Supreme Court in *Pulley*, had wholly failed to compare applicant's case with other cases to determine whether his death sentence was disproportionate to the punishment imposed on others. Under those circumstances, it was reasonable to conclude that Autry's execution should be stayed pending the decision in *Pulley*, or until further order of the Court.

That is not the case here. Our prior actions are ample evidence that we do not believe that the challenge to district-wide, rather than state-wide, proportionality review is an issue warranting a grant of certiorari. Our view remains the same. Nor did Williams convince the lower courts that he might have been prejudiced by the Louisiana Supreme Court's decision to review only cases from the judicial district in which he was convicted. Indeed, the District Court examined every published opinion of the Louisiana Supreme Court affirming a death sentence and concluded that Williams' sentence was not disproportionate regardless whether the review was conducted on a district-wide or state-wide basis. We see no reason to disturb that judgment. Finally, Williams has not shown, nor could he, that the penalty imposed was disproportionate to the crimes he was convicted of committing.

III

The District Court's careful opinion was fully reviewed by the Court of Appeals, which found no basis for upsetting the District Court's conclusion that Williams' contentions were meritless. The arguments that Williams raised for the first time in these proceedings are insubstantial, and the arguments that he has attempted to relitigate are no more persuasive now than they were when we first rejected them. We

conclude, therefore, that the stay entered by the Court of Appeals should be vacated.

SUPREME COURT OF THE UNITED STATES

No. A-301

ROSS MAGGIO, WARDEN v. ROBERT WAYNE WILLIAMS

ON APPLICATION TO VACATE STAY

[November 7, 1983]

JUSTICE STEVENS, concurring in the judgment.

In my opinion the stay application raises a serious question about the propriety of the prosecutor's argument to the jury at the sentencing phase of petitioner's trial. In that argument the prosecutor sought to minimize the jury's responsibility for imposing a death sentence by implying that the verdict was merely a threshold determination that would be corrected by the appellate courts if it were not the proper sentence for this offender. I quote some of that argument:

> "*I want to read you some lines because something they [the defense] said, don't sentence this man to death, don't kill this man. You see, you have the last word on the verdict, and it but, by far you don't have the last word on it if you return it.* The Louisiana Supreme Court has enacted a series of statutes that I want to read to you. What happens if you return a death penalty in this case. Because the law that's set up is very exacting, detailed and complicated procedure for a review of this court, the Louisiana Supreme Court, and other courts before any death penalty can be imposed. The law states, 905.9, Review on Appeal, The Supreme Court of Louisiana shall review of every sentence of death to determine if it is excessive. The Court, by rule, shall establish such procedures as necessary to satisfy constitutional criteria for review. And, then the

statute, they enact it. See, not necessarily, its's mandatory that the Supreme Court review it. There's seven judges on the Supreme Court. The highest judges in this state. For it to be upheld, four of them will have to approve it. Well, what do they review? They state that every sentence of death shall be reviewed by this court to determine if it is excessive, and in determining whether the sentence is excessive, the court shall determine. ' A. whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. If they decide it was, they can reverse and order a life sentence. Where the sentence is disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. If they don't think this defendant—if they think the crime was heinous enough and the statutory circumstances were proved but they don't think it ought to be aplied to this defendant, they can reverse it and order a life sentence. Whenever the death penalty is imposed, a verbation transcript of the sentence hearing along with the record required on appeal shall be transferred to the Court. *They review everything that went on in this trial.* . . . And there is a total and complete investigation done on the defendant to determine whether or not they will let your decision to impose the death penalty stand. And only then does it make it through the Louisiana Supreme Court, and the defendant has a right, if he wishes—I'm not saying that it's granted in every case. It could be denied. It could be appealed all the way through the United States Supreme Court.

. . . . . .

"But more important, what is this verdict going to mean? *You see, you represent a certain segment of our society, law abiding people, raising families, working for a living, not robbing stores. You're the people that set the standards in this community. The Justices on*

the Supreme Court will review, and determine their decision whether or not if you decide to give him the death penalty, whether or not you were correct or not, but you see,—it use to be one." Tr. 290–292, 296 (emphasis supplied).

In my view, this argument encouraged the jury to err on the side of imposing the death sentence in order to "send a message" since such an error would be corrected on appeal (while a life sentence could not). I do not believe that argument accurately described the function of appellate review in Louisiana. The Louisiana Supreme Court does not review "everything" that occurred during the trial. If it finds that one aggravating factor supported the jury's verdict, it will not consider the defendant's claim that the jury improperly relied upon other aggravating factors in reaching its verdict. See *State* v. *James*, 431 So. 2d 399, 405–406 (La.), cert. denied, —— U. S. —— (1983). That rule was applied by the Louisiana Supreme Court in this very case. See *State* v. *Williams*, 383 So. 2d 369, 374 (La. 1980), cert. denied, 449 U. S. 1103 (1981). While that limitation on appellate review is constitutionally permissible in the context of Louisiana's death penalty statute, see *Zant* v. *Stephens*, —— U. S. —— (1983), given the state-law premises of Louisiana's capital punishment scheme, see *James*, 431 So. 2d, at 406, it certainly is a more limited form of appellate review than that described by the prosecutor.

In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal. That is especially true when the death penalty is at stake.

Nevertheless, because the essence of this issue was raised in prior proceedings questioning the competency of trial counsel—who failed to object to the argument when it was

made—the Court is justified in applying a strict standard of review to this second federal habeas corpus application. See *Sanders* v. *United States*, 373 U. S. 1, 15–17 (1963). I do not find an adequate justification for petitioner's failure to raise this argument in his earlier federal habeas action. Since petitioner did raise the related argument of ineffectiveness of counsel, he was no doubt aware of this argument and may have deliberately chosen not to raise it in the first habeas corpus petition. See *Barefoot* v. *Estelle*, —— U. S. ——, —— (1983); *Rose* v. *Lundy*, 455 U. S. 509, 520–521 (1982) (plurality opinion); *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963); *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). Moreover, since competent counsel failed to object to the argument at the trial itself, thereby failing to avail himself of the usual procedure for challenging this type of constitutional error, I question whether it can be said that this trial was fundamentally unfair. See *Rose* v. *Lundy*, 455 U. S., at 543 and n. 8 (STEVENS, J., dissenting). Accordingly, though not without misgivings, I concur in the Court's decision to deny the stay application.

SUPREME COURT OF THE UNITED STATES

No. A-301

ROSS MAGGIO, WARDEN v. ROBERT WAYNE WILLIAMS

ON APPLICATION TO VACATE STAY

[November 7, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Before the Court is an application, filed by the state of Louisiana, to vacate a stay of execution granted by the United States Court of Appeals for the Fifth Circuit.[1] Because the condemned, Robert Wayne Williams, has raised a substantial constitutional claim relating to the proportionality review undertaken by the Supreme Court of Louisiana when it affirmed his death sentence, I would deny the application. Moreover, because the Court's approach to this case displays an unseemly and unjustified eagerness to allow the state to proceed with Williams' execution, I dissent.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would deny the state of Louisiana's application to vacate the stay of execution granted by the Court of Appeals.

II

Even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circum-

[1] See *Williams v. Maggio*, No. 83-3647 (CA5 Oct. 23, 1983). Prior to the action of the Court of Appeals, the execution of Williams had been set for between 12:00 a. m. and 3:00 a. m. on Tuesday, October 25, 1983.

stances, I would deny Louisiana's application in this case because Williams has raised a substantial constitutional claim concerning the disproportionate nature of his sentence.

On November 7, 1983, the Court will hear oral argument in *Pulley* v. *Harris*, No. 82-1096, to consider whether the Constitution requires, prior to the execution of any death sentence, that a court of state-wide jurisdiction determine whether a death sentence is proportional to the crime committed in light of the sentences received by similarly charged and convicted defendants in the state. Specifically, the questions presented to the Court for review are (1) whether the Constitution requires any proportionality review by a court of state-wide jurisdiction prior to the execution of a state death sentence and (2) if so, whether the Constitution requires that such review assume any particular focus, scope, or procedural structure. Williams maintains that the order of the Court of Appeals staying his execution should be allowed to stand pending this Court's plenary consideration and disposition of the issues raised in *Pulley*. There is simply no defensible basis for disagreeing with him.

His commonsense position rests on several related arguments. Initially, it is beyond dispute that the constitutional status of proportionality review is currently unclear. That is undoubtedly why the Court granted the petition for a writ of certiorari in *Pulley*. See 460 U. S. —— (1983). It is also why JUSTICE WHITE, just last month, stayed the execution of James David Autry pending our decision in *Pulley*. See *Autry* v. *Estelle*, 464 U. S. —— (1983) (WHITE, J., in chambers). See also *infra*, at ——. Given this uncertainty, it seems grossly inappropriate to allow an execution to take place at this time if the condemned prisoner raises a nonfrivolous argument relating to the proportionality of his sentence. And in this case, Williams has raised at least two nonfrivolous, and indeed substantial, claims concerning the proportionality of his death sentence.

First, Williams contends that the Supreme Court of Louisiana has denied him due process of law by undertaking only a district- or parish-wide proportionality review in his case. See *State* v. *Williams*, 383 So. 2d 369, 374–375 (La. 1980), *cert. denied*, 449 U. S. 1103 (1981). He properly notes that prior opinions of this Court have suggested that state-wide proportionality review is required before any constitutional death sentence may be carried out. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 198, 204–206 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (approving death penalty in Georgia where appellate court examines whether the same sentence has been imposed "'in similar cases throughout the state'"); *id.*, at 223 (opinion of WHITE, J.) (noting with approval that the state supreme court vacates the death sentence "whenever juries across the State impose it only rarely for the type of crime in question").[1] Given that the necessary scope of any required proportionality review is among the questions presented in *Pulley*, any uncertainty concerning the continuing validity of these prior statements will presumably be answered by our decision in that case. The execution of a condemned prisoner raising a nonfrivolous claim on this particular issue prior to the release of that decision belies our boast to be a civilized society.[2]

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[1] See also *Proffitt* v. *Florida*, 428 U. S. 242, 258–260 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (approving death penalty in Florida where appellate review is done "by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality" in the imposition of the penalty); *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *Zant* v. *Stephens*, —— U. S. ——, —— and n. 19 (1983).

[2] The Court does not conclude that Williams' challenge to the district-wide proportionality review undertaken by the state supreme court is a frivolous or even a nonsubstantial claim. Indeed, at least one justice of the Supreme Court of Louisiana has argued that the limited scope of such review does not satisfy federal constitutional standards. See *State* v. *Prejean*, 379 So. 2d 240, 249–252 (La. 1980) (Dennis, J., dissenting from denial of rehearing).

Second, even if a proportionality review limited to a single judicial district might eventually be held to pass constitutional muster, Williams notes that recent decisions of the Supreme Court of Louisiana have randomly applied proportionality reviews that are state-wide in scope. See, *e. g.*, *State* v. *Moore*, 432 So. 2d 209, 225–228 (La. 1983) (limited comparison of first-degree murder cases state-wide); *State* v. *Narcisse*, 426 So. 2d 118, 138–139 (La. 1983) (similar comparison between several districts rather than the customary one). The state court's failure to adopt any consistent approach in its review of capital cases, combined with its failure to offer any reasons for these different approaches, suggests that his death sentence has been imposed in a capricious and arbitrary manner. Again, at least until this Court clarifies the need for, and potential scope of, proportionality review in *Pulley*, I find it startling that the Court should allow this execution to take place.

A simple examination of the proportionality review that was undertaken in this case demonstrates its inadequacy.[4]

Rather, the Court concludes that the challenge does not present "an issue warranting a grant of certiorari." See *ante*, at ——. But as noted above, the Court has already granted a petition for certiorari in *Pulley* that poses a question concerning the constitutionally required scope of any proportionality review. Therefore, the Court's conclusion that the claim raised by Williams is not "certworthy" is directly contradicted by the Court's previous actions in *Pulley*. See also *Baldwin* v. *Maggio*, 704 F. 2d 1325, 1326 n. 1, (CA5 1983), in which the Court of Appeals for the Fifth Circuit recognized the similarity between the claims raised in *Pulley* and the claim raised by Williams and other condemned prisoners in Louisiana.

[4] Article 905.9 of the Louisiana Code of Criminal Procedure requires that the Supreme Court of Louisiana "review every sentence of death to determine if it is excessive" and directs the court to "establish such procedures as are necessary to satisfy constitutional criteria for review." La. Code Crim. Proc. Ann., Art. 905.9 (West Supp. 1983). Acting pursuant to that direction, the court has adopted its own Rule 28, which provides in relevant part that "[i]n determining whether the sentence is excessive the court shall determine . . . whether the sentence is disproportionate to the

The review was undertaken in April 1980, when Williams' case was on direct appeal before the Supreme Court of Louisiana. The court compared the circumstances of Williams' crime with the crimes of other capital defendants in the Nineteenth Judicial District for the Parish of East Baton Rouge, Louisiana, the district or parish in which Williams was tried and convicted. At that time, only 28 murder prosecutions had taken place in the district since January 1, 1976, the relevant date under state rules on which to begin the comparison. Of those 28 prosecutions, only 11 resulted in convictions for first-degree murder. And of those 11, only 3 defendants were sentenced to death. Like Williams, all three were the actual killers in a murder taking place during the perpetration of an armed robbery. And the court conclusorily noted that the crimes committed by the 8 defendants receiving life imprisonment had no aggravating circumstances or some mitigating circumstances and therefore were distinguishable from Williams' case. But, as the state court also admitted, Williams had no significant prior criminal record and may have been affected by a drug-induced mental disturbance. Therefore, the proportionality review undertaken in this case, limited as it was to a few cases arising in a single judicial district, could not ensure that similarly situated defendants throughout the state of Louisiana also had received a death sentence.

Louisiana has a total of 40 judicial districts in which a death sentence may be imposed. They apparently range from districts that cover primarily rural areas to a district that covers

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penalty imposed in similar cases, considering both the crime and the defendant." Louisiana Supreme Court Rule 28, § 1(c).

Moreover, the system for appellate review in Louisiana was intentionally patterned after the procedure for review authorized by the Georgia death-penalty statute and approved by this Court in *Gregg v. Georgia*, 428 U. S. 153 (1976). See *State v. Sonnier*, 379 So. 2d 1346, 1358 (La. 1979). The Georgia procedure, of course, includes a proportionality review that compares a death sentence to other sentences imposed *throughout the state*. *Gregg v. Georgia*, *supra*, at 204–206; see *supra*, at ——.

the urban center of New Orleans. Yet by allowing the Supreme Court of Louisiana to limit its proportionality review to a particular district, the Court today sanctions a practice that undoubtedly results in different sentences for similarly situated defendants, dependent solely upon the judicial district in which the defendant was tried. This is the essence of arbitrary and capricious imposition of the death penalty that the Court has consistently denounced. "A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Barclay* v. *Florida*, 463 U. S. ——, —— (1983) (STEVENS, J., concurring). Central to these protections is a system that includes meaningful appellate review for every death sentence. See, *e. g.*, *Zant* v. *Stephens*, 462 U. S. ——, —— (1983); *Gregg* v. *Georgia*, *supra*, at 195, 204-206. Given the existence of only one state-wide death penalty statute approved by the Louisiana state legislature, requiring that all courts and juries across the state apply uniform legal standards before imposing a death sentence, there can be no doubt of the substantiality of the constitutional question whether the state supreme court may apply different standards of appellate review depending on the judicial district involved.

In sum, Williams has raised a substantial claim challenging the constitutionality of his death sentence which is encompassed within the questions presented to the Court in *Pulley* v. *Harris*. Given the severity and irrevocability of the death sentence, it is shocking that the Court does not follow its normal procedures in this case. Under these procedures, the stay of execution should be left in force pending the timely filing of a petition for certiorari, and the final disposition in *Pulley*.

III

The Court offers no defensible rationale for departing from this sensible practice.[1] Its action in this case is especially

[1] On several occasions, I and other members of the Court have expressed disapproval for the "'growing and inexplicable readiness . . . to

troubling because (1) it is based on the minimal filings associated with a stay application, (2) it effectively preempts one of the questions presented for review in *Pulley*, and (3) it apparently is an irrevocable decision that will result in Williams' execution.

Less than four weeks ago, on October 5, 1983, JUSTICE WHITE stayed the execution of a condemned prisoner who, mere hours before his execution, claimed that he had been denied due process because the Texas Court of Criminal Appeals had failed to subject his death sentence to any proportionality review. See *Autry* v. *Estelle*, 464 U. S. —— (1983) (WHITE, J., in chambers). JUSTICE WHITE concluded that Autry's execution should be stayed pending disposition of *Pulley* because the Court's decision in *Pulley* will likely have a bearing on the validity of that prisoner's last-minute claim. Since then, the full Court has refused to vacate that stay. 464 U. S. —— (1983). Incredibly, the sensible practice followed in *Autry* has been rejected in this case because the Supreme Court of Louisiana utilized a limited proportionality review whereas in *Autry* the state court did not apply any such review. For present purposes, however, this is a distinction which should make no difference. Given the questions presented in *Pulley*, see *supra*, at ——, it is impossible to be certain that the proportionality review accorded Williams satisfies the constitutional requirements that the *Pulley* decision is intended to clarify.

It is no answer that the Court has consistently denied challenges to Louisiana's district-wide proportionality review, including Williams' own challenge to that review in his petition for certiorari on first federal habeas. 463 U. S. —— (1983). For each of these denials, as is true of all denials of certiorari, are not decisions on the merits of the issues raised in the respective petitions. More important, in none of those cases

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'dispose of' cases summarily.'" *Hutto* v. *Davis*, 454 U. S. 370, 387–388 (1982) (BRENNAN, J., dissenting) (quoting *Harris* v. *Rivera*, 454 U. S. 339, 349–350 (1981) (MARSHALL, J., dissenting)). For the various reasons expressed in the text, this practice proves especially disturbing in this case.

did the Court's denial of certiorari involve an imminent date of execution. In this case, by contrast, the Court's action will allow the execution of Williams to proceed to its fatal conclusion even though uncertainty overhangs the constitutional legitimacy of the process by which his death sentence was affirmed.[4]

Nor may the Court take comfort in the fact that, in the course of denying Williams' request for habeas relief, the federal District Court conducted an abbreviated state-wide proportionality review based on the published opinions of the Supreme Court of Louisiana. Although the District Court concluded that Williams' sentence was not disproportionate, that finding is largely irrelevant to the issue raised by Williams. The District Court's judgment regarding the proportionality of the death sentence is insufficient because it cannot substitute for the state supreme court, which is presumably more familiar than the federal court with the important nuances of the state's death-penalty jurisprudence. Moreover, because Williams' requested remedy on habeas was a remand to the state court for a state-wide proportionality review, the District Court did not have the benefit of any arguments from counsel for Williams on how that state-wide review should be conducted. That the District Court conducted a hasty proportionality review based solely on published opinions from the state supreme court should not be deemed constitutionally sufficient.

Finally, the Court gives insufficient weight to the potential prejudicial effect of the limited, district-wide review conducted in Williams' case. In fact, Williams' habeas petition

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[4] Under Louisiana law, "If any federal court . . . grants a stay of execution, the trial court shall fix the execution date at not less than thirty days nor more than forty-five days from the dissolution of the stay order." La. Rev. Stat. Ann. § 15:567 (West Supp. 1983). This means that Williams' execution can be rescheduled mere weeks after this Court hears oral argument in *Pulley*, at a time when it is extremely unlikely that the Court will have already rendered its decision in that case.

has identified at least two specific ways in which he has been prejudiced by a district-wide, rather than a state-wide, proportionality review. First, he claims that there has never been a state-wide pattern of death sentences for persons committing murder during armed robbery, especially when there was a close question whether the murder was committed with specific intent or was simply accidental. Second, Williams claims that his case presented mitigating circumstances comparable to various cases in other parts of the state which resulted in sentences of life imprisonment. These are exactly the types of disparities which a proportionality review of proper scope would discover.

The Court, therefore, plainly offers no reason for treating this case differently from any other stay application raising questions which are encompassed within a substantially similar case then pending on the Court's plenary docket. Rather, "an appeal that raises a substantial constitutional question is to be singled out for summary treatment *solely because the State has announced its intention to execute . . . before the ordinary appellate procedure has run its course.*" *Barefoot* v. *Estelle*, 463 U. S. ——, —— (1983) (MARSHALL, J., dissenting) (emphasis in original).[1]

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[1] At least two other claims raised by Williams also suggest that the state should not be allowed to proceed with this execution. First, as JUSTICE STEVENS notes, *ante*, at ——, Williams has raised a serious question concerning the prosecutor's argument to the jury. That argument unduly prejudiced Williams because, by overstating the role of appellate review, it both misstated Louisiana law and allowed the jury to discount its grave responsibilities when imposing the death sentence. Unlike JUSTICE STEVENS, however, I believe *Sanders* v. *United States*, 373 U. S. 1 (1963), mandates that the case be remanded for a full hearing on this matter.

Second, Williams has alleged that exclusion for cause of jurors unequivocally opposed to the death penalty resulted in a biased jury during the guilt-phase of the trial proceedings against him. The Court has previously noted that, "in light of . . . presently available information," it cannot be said that such juror exclusion results in an unrepresentative jury on the issue of guilt. See, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S. 510, 516-518 (1968). See also *Bumper* v. *North Carolina*, 391 U. S. 543, 545, and n.

IV

By vacating the stay granted by the Court of Appeals and allowing the execution of Williams to proceed, the Court is implicitly choosing to adopt one of two wholly unacceptable alternatives. Either the Court, prior to its full consideration of *Pulley*, is preempting any conclusion that the Constitution mandates state-wide proportionality review, or the Court is announcing that someone may be executed using appellate procedures that might imminently be declared unconstitutional. Only after full consideration and disposition of *Pulley* will the Court be in a position to determine with reasonable assurance the validity of the claims raised by Williams. I am appalled that the Court should be unwilling to let stand a stay of execution pending the clarification of this issue.

I dissent.

8-6 (1968). That conclusion, however, was reached 15 years ago, and recent cases and scholarship suggest that it may need to be re-examined. See, *e. g.*, *Grigsby v. Mabry*, No. PB-C-78-32 (ED Ark. Aug. 5, 1983); Wisick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982). An evidentiary hearing on this issue is clearly necessary.

SUPREME COURT OF THE UNITED STATES

No. A-301

ROSS MAGGIO, WARDEN *v.* ROBERT WAYNE WILLIAMS

ON APPLICATION TO VACATE STAY

[November 7, 1983]

JUSTICE BLACKMUN, dissenting.

I would not vacate the stay granted by the United States Court of Appeals for the Fifth Circuit until this Court decides *Harris v. Pulley*, argued on November 7, 1983. I share JUSTICE BRENNAN's view that the resolution of the proportionality issue presented in *Pulley* inevitably will have some bearing on the proportionality issue raised by Robert Wayne Williams. To be sure, the decision forthcoming in *Pulley v. Harris* may or may not be favorable to Williams. However that may be, by vacating the stay, the Court today summarily decides the issue against Williams and, to that extent, pre-empts *Pulley*.

It seems to me that standards of orderly procedure require that the stay of execution granted by the Fifth Circuit remain in effect until *Pulley* is decided. I therefore dissent from what appears to be an untoward rush to judgment in a capital case.

APPENDIX D

STATE

BY MR. SINGLEFIELD:

I WOULD QUICKLY COMMENT ON A COUPLE OF POINTS THAT MR. COVELL MADE. NUMBER ONE, ABOUT THE LAWYERS, I, OF COURSE, I AGREE WITH WHAT MR. COVELL, MR. WEIMER, APPOINTED IN THIS CASE, MR. WEIMER OF LONG YEARS EXPERIENCE IN ALL PHASES OF THE LAW, INCLUDING CRIMINAL LAWS. MR. COVELL IS A YOUNG LAWYER, WHO HAS ALREADY BEEN INVOLVED IN THE DEFENSE IN SEVERAL MURDER CASES. I THINK IT SPEAKS WELL OF OUR SYSTEM THAT LAWYERS ARE APPOINTED AND PAID TO REPRESENT THIS DEFENDANT UNDER OUR SYSTEM. SO, I TAKE NO ISSUE WITH THAT. THE ONLY OTHER COMMENT, I GUESS A COUPLE OF THEM, HE STATED, I THINK HE MAY HAVE MISUNDERSTOOD. I DON'T SUGGEST THAT ANY MURDER IS DIGNIFIED. WHAT I SUGGESTED WAS THAT WILLIE KELLY WAS ENTITLED TO DIE MORE DIGNIFIED THAN THAT. WHAT I THINK IS, HE SHOULD BE ENTITLED AT THE AGE OF 67. AND YOU SEE, DON'T LET THAT FOOL YOU. FROM MY UNDERSTANDING FROM THE EVIDENCE, WILLIE KELLY WAS 67, BUT HE STILL HELD DOWN A JOB, OR HE GOT AROUND. HE WAS AN ACTIVE MAN, LOOKING FORWARD TO MORE YEARS OF HIS LIFE. HE WASN'T READY TO LAY DOWN IN BED AND DIE. IF HE WAS, HE WOULDN'T HAVE BEEN OUT HERE WORKING, MAKING HIS OWN LIVING. I ASSUME, SPENDING HIS MONEY WHERE HE WANTED TO, OR WEARING THAT UNIFORM AND CARRYING A GUN. SO, I DON'T THINK YOU GOT ANY RIGHT JUST BECAUSE HE'S 67 YEARS OLD TO SAY THAT HE WANTED IT TO BE OVER. HE WANTED TO BE OU OF HERE AMONGST US, EITHER ANY LESS THAN ANY OF THE REST OF US. AS FAR AS YOUR DELIBERATION, IT DID TAKE YOU LONG TO DELIBERATE. I APPRECIATE THE FACT THAT YOU DISCUSSED THE EVIDENCE AND

RETURNED A FIRST DEGREE MURDER VERDICT. I THINK AS IT'S ALMOST --- BY THE DEFENSE. AND I THINK YOU MADE A CORRECT DECISION. AND A DECISION THAT YOU CAN LIVE WITH AND BE PROUD WITH AND NEVER HAVE TO LOOK BACK ON. AS I SAID IN THE OPENING STATEMENT IF YOU REMEMBER, ONE, I THINK THE ONLY OBJECTION I MADE DURING THIS ENTIRE TRIAL. I MAY BE WRONG. THE RECORD MAY CORRECT ME, BUT I THINK THE ONLY OBJECTION I MADE WAS IN THE OPENING ARGUMENT WHEN THEY SAID THAT I'VE BEEN TRYING MURDER CASES FOR YEARS AND WHEN I LEFT HERE I WAS GOING TO LEAVE. I ASSURE YOU THAT THAT'S WRONG. I CAN REMEMBER EVERY ONE IN EIGHT YEARS THAT I'VE TRIED. I REMEMBER THE WITNESSES. I CAN REMEMBER THE VICTIMS. AND I DON'T BACK AWAY FROM THEM. I LIVE WITH IT. AND I DON'T SECOND GUESS MY DECISIONS. AND I DON'T HAVE ANY THAT I SECOND GUESS. IN THIS CASE, FIRST OF ALL, ON REBUTTAL, LET ME SAY THAT THE LAW, OF COURSE, IS THAT YOU DECIDE THIS PHASE OF THE TRIAL AT THIS TIME. WE'RE ALL HUMAN BEINGS, AND I CAN'T HELP BUT THINK AND I THINK IT'S TOTALLY NORMAL THAT FROM THE VERY OUTSET OF THIS TRIAL, YOU'VE GOT TO HAVE IN MIND WHAT DECISION YOU WOULD MAKE AS FAR AS RETURNING THE DEATH PENALTY IF IT REACHED THIS PHASE OF THE TRIAL. SOME OF YOU MAY HAVE MADE YOUR DECISION. IT'S HARD TO SIT AND LISTEN TO THE TOTALITY OF THE EVIDENCE AND NOT MAKE THAT DECISION. IF YOU HAVE, IF YOU HAVE DECIDED NOT TO RENDER A DEATH SENTENCE, I ASK YOU TO RECONSIDER AT THIS TIME AND CONCENTRATE ON IT. YOU SAY, WELL, WHY, WHAT'S THE DIFFERENCE TO LOCK A MAN UP FOR LIFE WITHOUT SUSPENSION, PROBATION, OR PAROLE OR GIVE HIM THE DEATH SENTENCE. I THINK IT'S VERY IMPORTANT. AND I WANT TO DISCUSS THAT WITH YOU IN DETAIL. BEFORE I DO, I WANT TO READ YOU SOME LAWS BECAUSE SOMETHING THEY SAID, DON'T SENTENCE THIS MAN TO DEATH, DON'T KILL THIS MAN. YOU SEE, YOU HAVE THE LAST WORD ON THE VERDICT, AND IT

STANDS. BUT, IT DOESN'T, ASSUMING YOU RETURN THE DEATH PENALTY, AND YOU SHOULD ASSUME, AND I'M NOT TRYING TO PLAY THIS DOWN, BUT YOU SHOULD ASSUME FOR THE PURPOSE OF DELIBERATION THAT SOMETIME IN THE FUTURE THE DEFENDANT COULD BE PUT TO DEATH IF YOU RETURN SUCH A PENALTY. BUT, BY FAR YOU DON'T HAVE THE LAST WORD ON IT IF YOU RETURN IT. THE LOUISIANA SUPREME COURT HAS ENACTED A SERIES OF STATUTES THAT I WANT TO READ TO YOU. WHAT HAPPENS IF YOU RETURN A DEATH PENALTY IN THIS CASE. BECAUSE THE LAW THAT'S SET UP IS VERY EXACTING, DETAILED AND COMPLICATED PROCEDURE FOR A REVIEW OF THIS COURT, THE LOUISIANA SUPREME COURT, AND OTHER COURTS BEFORE ANY DEATH PENALTY CAN BE IMPOSED. THE LAW STATES, 905.9, REVIEW ON APPEAL, THE SUPREME COURT OF LOUISIANA SHALL REVIEW OF EVERY SENTENCE OF DEATH TO DETERMINE IF IT IS EXCESSIVE. THE COURT, BY RULE, SHALL ESTABLISH SUCH PROCEDURES AS NECESSARY TO SATISFY CONSTITUTIONAL CRITERIA FOR REVIEW. AND, THEN THE STATUTE, THEY ENACT IT. SEE, NOT NECESSARILY, IT'S MANDATORY THAT THE SUPREME COURT REVIEW IT. THERE'S SEVEN JUDGES ON THE SUPREME COURT. THE HIGHEST JUDGES IN THIS STATE. FOR IT TO BE UPHELD, FOUR OF THEM WILL HAVE TO APPROVE IT. WELL, WHAT DO THEY REVIEW? THEY STATE THAT EVERY SENTENCE OF DEATH SHALL BE REVIEWED BY THIS COURT TO DETERMINE IF IT IS EXCESSIVE, AND IN DETERMINING WHETHER THE SENTENCE IS EXCESSIVE, THE COURT SHALL DETERMINE. A. WHETHER THE SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTORS. IF THEY DECIDE IT WAS, THEY CAN REVERSE IT AND ORDER A LIFE SENTENCE TO BE IMPOSED. WHETHER THE EVIDENCE SUPPORTS THE JURY'S FINDINGS OF A STATUTORY AGGRAVATING CIRCUMSTANCE. IF THEY FIND IT DIDN'T, THEY CAN REVERSE IT AND ORDER A LIFE SENTENCE. WHERE THE SENTENCE IS DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES

CONSIDERING BOTH THE CRIME AND THE DEFENDANT. IF THEY DON'T THINK THE CRIME WAS HEINOUS ENOUGH, THEY CAN REVERSE IT AND ORDER A LIFE SENTENCE. IF THEY DON'T THINK THIS DEFENDANT -- IF THEY THINK THE CRIME WAS HEINOUS ENOUGH AND THE STATUTORY CIRCUMSTANCES WERE PROVED BUT THEY DON'T THINK IT OUGHT TO BE APPLIED TO THIS DEFENDANT, THEY CAN REVERSE IT AND ORDER A LIFE SENTENCE. WHENEVER THE DEATH PENALTY IS IMPOSED, A VERBATIUM TRANSCRIPT OF THE SENTENCE HEARING ALONG WITH THE RECORD REQUIRED ON APPEAL SHALL BE TRANSFERRED TO THE COURT. THEY REVIEW EVERYTHING THAT WENT ON IN THIS TRIAL. UNIFORM CAPITAL SENTENCE REPORT. WHEN THE DEATH PENALTY IS IMPOSED, THE TRIAL JUDGE SHALL EXPEDIOUSLY COMPLETE AND FILE OF RECORD THE UNIFORM CAPITAL SENTENCE REPORT. THEY CALL ON THE DISTRICT ATTORNEY, THE DEFENSE ATTORNEY, THE DEPARTMENT OF PROBATION OR PAROLE, THE DEPARTMENT OF CORRECTIONS TO PROVIDE ANY INFORMATION NEEDED. HE HAS TO CAUSE A SENTENCE INVESTIGATION TO BE CONDUCTED AND THE REPORT TO BE ATTACHED TO THE UNIFORM CAPITAL SENTENCE REPORT, A SEPARATE DOCUMENT. TWO DOCUMENTS AT THAT POINT WILL BE REVIEWED. THAT REPORT GOES INTO THE DEFENDANT'S PRIOR CRIMINAL ACTIVITY, FAMILY SITUATION, BACKGROUND, EDUCATION, ECONOMIC, EMPLOYMENT STATUS, ANY OTHER RELEVANT FACTORS CONCERNING THE DEFENDANT. THE REPORT SHALL BE SEALED EXCEPT AS PROVIDED BELOW. DEFENSE COUNSEL AND THE DISTRICT ATTORNEY SHALL BE FURNISHED A COPY -- SEVEN DAYS TO FILE A WRITTEN OPPOSITION TO THE FACTUAL CONTENTS, EITHER SIDE, ANOTHER REPORT. IN ADDITION, THIS IS SECTION FOUR, SENTENCE REVIEW MEMORANDUM, ANOTHER SEPARATE DOCUMENT IN ADDITION TO THE BRIEF REQUIRED ON APPEAL FOR GUILT DETERMINATION AT TRIAL, THE DISTRICT ATTORNEY AND DEFENDANT SHALL FILE A SENTENCE REVIEW MEMORANDUM ADDRESSED TO THE PROPRIETY OF THE SENTENCE BOTH SIDES. THE FORM SHALL CONFORM

IN SO FAR AS APPLICABLE -- REQUIRED FOR BRIEF. THE DISTRICT ATTORNEY IN THIS CASE, I'M AN ASSISTANT DISTRICT ATTORNEY, I ACT FOR THE DISTRICT ATTORNEY. THE DISTRICT ATTORNEY SHALL FILE A MEMORANDUM ON BEHALF OF THE STATE IN THE TIME PROVIDED. THE MEMORANDUM SHALL INCLUDE -- LISTEN TO THIS. YOU SEE, DON'T WORRY ABOUT THESE OTHER DOCUMENTS. I THINK THERE'S FOUR SO FAR, BUT LISTEN TO THIS. A LIST OF EACH FIRST DEGREE MURDER CASE IN THE DISTRICT WHICH SENTENCE WAS IMPOSED AFTER JANUARY 1, 1976. THE LIST SHOULD INCLUDE THE DOCKET NUMBER, CAPTION, CRIME CONVICTED, SENTENCE ACTUALLY IMPOSED, A SYNOPSIS OF THE FACTS AND RECORD CONCERNING THE CRIME OF THE DEFENDANT. A SYNOPSIS OF THE FACTS AND RECORD CONCERNING THE CRIME OF THE DEFENDANT IN THE INSTANT CASE, AND ANY OTHER MATTER RELATING TO THE GUIDE LINES IN SECTION 1. DEFENSE COUNSEL IS REQUIRED TO FILE A MEMORANDUM ON BEHALF OF THE DEFENDANT. THE MEMORANDUM SHALL ADDRESS ITSELF TO THE STATE'S MEMORANDUM AND ANY OTHER MATTER RELATIVE TO THE GUIDE LINES. THE SUM TOTALITY IS THAT THERE HAS TO BE A TOTAL PRESENTENCE REPORT. THE DISTRICT ATTORNEY HAS TO FILE BRIEFS AND MEMORANDUMS IN ADDITION, THERE IS A TOTAL REVIEW OF EVERY FIRST DEGREE MURDER CASE IN THIS PARISH SINCE JANUARY 1, 1976 LOOKING AT THE FACTS. AND THERE IS A TOTAL AND COMPLETE INVESTIGATION DONE ON THE DEFENDANT TO DETERINE WHETHER OR NOT THEY WILL LET YOUR DECISION TO IMPOSE THE DEATH PENALTY STAND. AND ONLY THEN DOES IT MAKE IT THROUGH THE LOUISIANA STATE SUPREME COURT, AND THE DEFENDANT HAS A RIGHT, IF HE WISHES -- I'M NOT SAYING THAT IT'S GRANTED IN EVERY CASE. IT COULD BE DENIED. IT COULD BE APPEALED ALL THE WAY THROUGH THE UNITED STATES SUPREME COURT. YOU COULD EASILY SAY WELL, MR. SINGUEFIELD, IF IT'S GOT TO GO THROUGH ALL OF THAT, WHY ARE YOU WASTING ALL OF THIS TROUBLE. IT SOUNDS LIKE IT WOULD BE

EASIER FOR YOU TO JUST SAY GIVE HIM THE LIFE SENTENCE AND YOU CAN AVOID ABOUT SIX MONTHS OF WORK. I VOLUNTEER FOR THAT WORK. SO, DON'T WORRY ABOUT ME. I'LL DO IT AND I'LL SEE THAT IT'S DONE. I'LL SEE THAT IT'S DONE TO THE LETTER OF LAW BECAUSE I THINK THIS CASE DESERVES IT. SO DON'T WORRY ABOUT THAT. I'LL VOLUNTEER FOR THE STATE'S PART OF THIS, AND I'LL DO IT, AND I'LL SEE THAT IT'S DONE. I PROMISE YOU. BECAUSE I THINK THERE OUGHT TO BE THREE THINGS YOU CONSIDER IN THIS CASE. CERTAINLY, THE DEFENDANT WISHES YOU TO COME BACK AND SHOW MERCY, SHOW THAT THERE'S A MITIGATING CIRCUMSTANCE WHERE I DON'T THINK THERE IS, AND GIVE HIM A LIFE SENTENCE WHEREIN I DON'T THINK YOU'LL FIND A CRIME MORE RICHLY DESERVING OF THE DEATH PENALTY, AND EVEN OF ITS ULTIMATE ENFORCEMENT, IF IT EVER REACHES THAT STAGE IN THIS CASE. YOU SHOULD CONSIDER THREE THINGS IN YOUR DELIBERATIONS. AND AGAIN, I ASK YOU, IF YOU'VE MADE UP YOUR MIND, I ASK YOU TO RECONSIDER. AND I KNOW THAT IT'S A DIFFICULT THING THAT I ASK YOU TO DO. HOW MUCH EASIER IT IS. WE ARE ATTUNED TO IT. WE ARE ATTUNED TO SHOW MERCY IN THIS COUNTRY, BUT THERE COMES A TIME AND THERE COMES A CRIME, AND I SAY THAT THIS IS IT, THAT SOMEBODY'S GOT TO PUT THEIR FOOT DOWN AND SAY WE'RE NOT GOING TO GO ANY FURTHER. IF YOU DO THIS, YOU'RE NOT GOING TO COME OUT, WE'RE NOT GOING TO SHOW YOU MERCY, WE'RE NOT GOING TO REDUCE ANYTHING. WE ARE GOING TO DEMAND THE ULTIMATE, THE HIGHEST PENALTY THAT LOUISIANA LAW AND OUR LEGISLATURE WILL PERMIT, WITHIN THE GUIDE LINES FOR REVIEW OF THAT SENTENCE. THAT WE'RE NOT GOING TO REDUCE IT. AND I SAY THIS IS THE TIME TO LOOK AT THIS CRIME. LOOK AT THREE THINGS. DID I PROVE THE AGGRAVATING CIRCUMSTANCES. HE ARGUED THAT MAYBE I DIDN'T PROVE ONE OR TWO. I DON'T THINK ANYBODY ARGUES THAT IT WAS AN ARMED ROBBERY. I ONLY HAVE TO PROVE ONE SO THAT STATUTE IS TOTALLY

SATISFIED. AND I DON'T THINK THERE'S ANY EVIDENCE, OTHER THAN REQUIRING SPECULATION, THAT ANY MITIGATING CIRCUMSTANCES WERE PROVED WHATSOEVER, BUT THAT'S ONLY A POINT. THAT'S THE TECHNICALITY THAT ALLOWS US TO GET THIS PAR BEFORE THE JURY. I THINK I PROVED HE WAS IN THE NATURE OF A PEACE OFFICER. IF YOU DON'T THINK I DID, THROW THAT ONE OUT. THERE'S THREE MORE THAT I DEFINITELY PROVED. CONSIDER THAT FIRST, AND I DON'T THINK THERE'S ANY QUESTION, YOU CAN SAY THAT I MET THE STATUTORY REQUIREMENT. BUT, TAKING ALL THAT INTO CONSIDERATION, SEE, WE DON'T HAVE COMPUTERS ON THIS JURY. A JURY IS STILL HUMAN BEINGS AND CITIZENS. ASSUMING THE TECHNICAL ASPECTS OF THE LAW ARE PROVEN, WHICH I DON'T THINK YOU HAVE ANY DOUBT, THEN YOU HAVE TO LOOK, I THINK, AT THE TOTALITY OF THE EVIDENCE AND CIRCUMSTANCES AND SAY TO YOURSELF, DOES HE DESERVE THIS PENALTY. DOES HE DESERVE MERCY. DOES HE DESERVE THIS JURY TO COME OUT AND LESSEN WHAT HE DID, TO SAY THAT THERE ARE MITIGATING CIRCUMSTANCES, THAT THERE IS SOME REASON. AND I DON'T THINK THERE SHOULD BE TO SHOW, GIVE HIM SOME — IS THERE? CAN YOU CONCEIVE OF — IT WAS A CRIME THAT WAS PREMEDITATED, CONCEIVED, IT WAS PLANNED. THEY, IT WASN'T AN IMPULSE. THEY WENT AND BORROWED A GUN THREE OR FOUR HOURS BEFORE THEY DID IT. THEY OBTAINED SKI MASKS, THEY CASED THE STORE. THEY MADE EFFORTS TO CONCEAL THEMSELVES. THEIR OBJECTIVE WAS GREED, FOR MONEY WITHOUT WORKING FOR IT. THEY WENT IN, THEY MEANT BUSINESS, THEY HAD ARMED, LOADED GUNS. THE FIRST THING THEY STRUCK ON, MAYBE WILLIE KELLY WASN'T A PEACE OFFICER, BUT SOMETHING ABOUT HIM DREW THEM DIRECTLY TO HIM. AND THAT'S BECAUSE HE HAD A UNIFORM AND A GUN. CERTAINLY I THINK HE'S IN THE NATURE OF A PEACE OFFICER. THEY WENT TO HIM AND WHEN HE MADE A MOVE, BAM. THEY KILLED HIM. THEY DIDN'T SUFFER ANY REMORSE. THEY DIDN'T

QUIT THERE AND SAY OH, NO, WE KILLED A MAN, LET'S JUST FORGET THIS AND GET OUT OF HERE. NO, UH-UH, JUST COOL AS CAN BE. THEY FINISHED THAT ROBBERY. SURE THIS MAN, I DIDN'T SAY THIS MAN BEAT THE OTHER MAN TO THE GROUND, BUT HE'S CERTAINLY A PRINCIPAL TO IT. HE'S ACTING IN CONCERT WITH THE PERSON THAT DID. CERTAINLY, I THINK HE SHOULD BE HELD RESPONSIBLE. HE'S THE ONE WHO SHOT THE SHOT GUN AND HIT THOSE OTHER PEOPLE. WHERE IS THE REASON WHY THERE? HE'S A STRANGER, A STRANGER TO CRIME, HE DIDN'T KNOW WILLIE KELLY, DIDN'T HAVE ANYTHING AGAINST WILLIE KELLY. LOOK AT WILLIE KELLY. I'M NOT, AND I STILL, I ARGUED THIS BEFORE AND I'LL TELL YOU THIS NOW, I'M NOT PREPARED TO BELIEVE THAT WILLIE KELLY WAS UNSNAPPING HIS STRAP. IF YOU LOOK AT THE NATURE OF THE MAN AND WHAT HE GOT HIMSELF INTO AND HE WAS SURPRISED AND THERE WAS A MAN WITH A SHOT GUN LEVELED AT HIM, AND ANOTHER ONE TRYING TO GET HIS GUN. IF YOU LOOK AT THE CHARACTER OF WILLIE KELLY, WILLIE KELLY MAY HAVE JUST SAID, TO HECK WITH THIS. I'M NOT FIXING TO STAND HERE AND JUST LET THEM GUN ME DOWN OR HOLD ME BACK AND SHOOT ME LATER OR WHATEVER THEY'RE FIXING TO DO. I'M FIXING TO HAVE IT OUT WITH THESE GUYS. WHATEVER HAPPENS NOW, I DON'T CARE WHAT THE CONSEQUENCES MAY BE. MAYBE HE WAS JUST HELPING THEM. I DON'T KNOW. YOU'LL HAVE TO SEARCH THAT IN YOUR MIND. I'VE GOT MY OPINION. AFTER THAT THEY TOOK THE MONEY, THEY SPENT IT, ECT. I HAVE SEEN NO REMORSE, NO REASON FOR ANYTHING, FOR MERCY. SO, I THINK, I DON'T THINK YOU CAN SAY OR AT ANY EXTENT SAY THAT UNDER THESE CIRCUMSTANCES THAT THE STATE HAS SATISFIED THE LEGAL REQUIREMENTS PLUS HE DESERVES IT. I'LL SAY THAT THE CRIME SPEAKS OF PUNISHMENT. A GROWN MAN, AN INTELLEGENT MAN, 27 YEARS OLD, TOOK THE ACT ON HIMSELF. THE CRIME FITS THE PUNISHMENT. AND PERHAPS THE MOST IMPORTANT, I DON'T THINK ANYBODY WILL HAVE ANY TROUBLE OR

DISAPPOINTMENT WITH WHAT I HAVE SAID. BUT MORE IMPORTANT, WHAT IS THIS VERDICT GOING TO MEAN? YOU SEE, YOU REPRESENT A CERTAIN SEGMENT OF OUR SOCIETY, LAW ABIDING PEOPLE, RAISING FAMILIES, WORKING FOR A LIVING, NOT ROBBING STORES. YOU'RE THE PEOPLE THAT SET THE STANDARDS IN THIS COMMUNITY. THE JUSTICES ON THE SUPREME COURT WILL REVIEW, AND DETERMINE THEIR DECISION WHETHER OR NOT IF YOU DECIDE TO GIVE HIM THE DEATH PENALTY, WHETHER OR NOT YOU WERE CORRECT OR NOT, BUT YOU SEE, -- IT USE TO BE ONE. I DON'T THINK ANY OF THEM LIVE IN EAST BATON ROUGE PARISH. WE HAVE GOT ONE THAT REPRESENTS EAST BATON ROUGE PARISH, AND I'M SURE HE MAINTAINS A DOMICILE, BUT HE MOVED TO ST. CHARLES AVENUE. YOU'RE THE PEOPLE THAT SET THE STANDARDS IN THIS COMMUNITY. AND I SAY THIS, AND THIS IS A CRIME THAT IF YOU WILL, OUTRAGED THIS COMMUNITY. IT SHOCKED IT. AND THE RESULTS OF THIS VERDICT WILL GO OUTSIDE OF THIS COURT ROOM. AND YOU REPRESENT WHAT THE STANDARDS IN BATON ROUGE IS GOING TO BE AMONGST THE LAW ABIDING PEOPLE. ARE WE GOING TO SET THE STANDARD OR IS ROBERT WILLIAMS GOING TO SET THE STANDARD? I SAY THAT YOU OUGHT TO SET IT. AND I THINK YOU OUGHT TO JUST PUT YOUR FOOT DOWN AND SAY IN THIS CIRCUMSTANCES, UNDER THIS, WE'RE GOING TO SET THE STANDARD AND REGARDLESS THE STANDARD'S GOING TO BE, WHEN YOU GO OUT THERE AND YOU GUN A MAN DOWN IN A GROCERY STORE, A LAW ABIDING CITIZEN, OUT THERE TRYING TO MAKE HIS LIVING, AND YOU TERRORIZE ALL THESE PEOPLE, WE NOT GOING TO FIND MERCY, WE NOT GOING TO SHOW YOU ANYTHING, WE ARE GOING TO DEMAND THAT THIS STANDARD BE SET, THAT THE MAXIMUM THE LAW CAN GIVE YOU, WHICH IN THIS CASE IS THE DEATH PENALTY, YOU ARE GOING TO FACE IT. AND YOU ARE GOING TO GO THROUGH THESE REVIEWS AND YOU ARE GOING TO THINK ABOUT IT. AND I ASK, AND I ASK THAT IF THERE'S ONE PERSON ON THIS JURY, IF THE JURY CAN'T MAKE UP ITS MIND ON THIS PART OF

IT, THEN THE JUDGE HAS TO SENTENCE THE MAN TO LIFE. AND I SAY THIS, IF YOU MAKE UP YOUR MIND ON THIS PART OF IT THAT HE OUGHT TO GET THE DEATH PENALTY, I ASK YOU TO STICK TO IT. IF IT'S AT LEAST ONE OF YOU ON THIS JURY, JUST ONE OF YOU THAT WILL SAY THAT I'M GOING TO, I'M NOT GOING TO DO IT, I'M NOT GOING TO BACK OFF OF THIS. I ASK YOU TO DO IT. DON'T GIVE IT UP, DON'T COME OUT AND MAKE A RECOMMENDATION FOR LIFE IN THIS CASE. AND I KNOW IT'S A HARD THING THAT I ASK THAT YOU DO. I KNOW IT'S HARD. IT'S SO MUCH, IT WOULD BE SO MUCH EASIER. AND I ASK YOU TO BE STRONG. PUT TEETH IN THIS CONVICTION. LET IT BE KNOWN THAT THIS IS OUR STANDARD. NOW, I REQUEST YOU TO COME BACK WITH THE RECOMMENDATION OF DEATH IN THIS CASE. THANK YOU.

THE COURT: LADIES AND GENTLEMEN, DO NOT DISCUSS THIS MATTER AMONG YOURSELVES. PLEASE RETIRE THE JURY.

* * * (JURY RETIRED) * * *

THE COURT: COUNSEL, APPROACH THE BENCH, PLEASE. THE COURT WILL BE AT RECESS FOR TEN MINUTES.

* * * RECESS * * *

THE COURT: IS THE STATE READY? IS THE STATE --

MR. SINQUEFIELD: THE STATE'S READY.

83-5902

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IN THE SUPREME COURT OF THE UNITED STATES

NO._____

ROBERT WAYNE WILLIAMS, PETITIONER

VS.

ROSS MAGGIO, WARDEN, RESPONDENT

****

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes petitioner, Robert Wayne Williams, through his undersigned attorney, appearing herein for the sole purpose of moving this Honorable Court to grant leave to file the attached petition for a Writ of Certiorari to the Louisiana Supreme Court without the prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of this Honorable Court, for the following reasons and upon the following grounds, to-wit:

1) That your peitioner's affidavit of poverty, adapted from form 4 of the Fed. Rules App. Proc. is attached hereto and made a part hereof and marked exhibit "A"; and,

2) That the Honorable, the United States Court of Appeals for the Fifth Circuit granted your petitoner's motion to so proceed in proceedings herein concerned as is evident from the certified copy of said Court's order attached hereto and made a part hereof and marked Exhibit "B"; and,

IT IS SO MOVED.

Samuel S. Dalton

Samuel S. Dalton, Attorney for Petitoner
2001 Jefferson Highway
P.O.Box 10501
Jefferson, Lousiana 70181
504-835 4289

IN THE SUPREME COURT OF THE UNITED STATES

NO._____

ROBERT WAYNE WILLIAMS, PETITIONER

VS.

ROSS MAGGIO, WARDEN, RESPONDENT

****

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

WITH WRIT OF CERTIORARI

STATE OF LOUISIANA

PARISH OF WEST FELICIANA

I, Robert Wayne Williams, being first duly sworn, depose and say that I am the petitioner, in the above-entitled case; that in support of my motion to proceed with the accompanying petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceddings or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to may ability to pay the cost of prosecuting the said Writ of Certiorari are true.

1. Are your presently employed? NO. I have been incarcerated in Louisiana Prisons since January 12, 1979 and prior thereto worked at various menial jobs for minimum wages or less.

2. Have you received within the past twelve months any income from abusiness, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO.

3. Do you own cash or checking or savings account? NO.

4. Do you own any real estate,stocks, bonds, notes, automobiles, or other valuable property? NO.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert W. Williams
ROBERTY WAYNE WILLIAMS

SUBSCRIBED AND SWORN TO BEFORE THIS 5 DAY OF December 1992.

Samuel Lee Dalton
NOTARY PUBLIC